Dec 12. 78. Arg'd N H Swayne

9 Otto 449

Oct. T. 1878

For

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 703.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JUNE 22, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 703.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Return	*b*	1
Citation and service	*c*	1
Summons	1	2
Complaint	5	3
Exhibit A.—Letter Robinson to Hopkins	19	7
Exhibit B.—Certificate Secretary of the Treasury	23	8
Demurrer	25	8
Order that demurrer be withdrawn	27	9
Answer	29	9
Findings	31	10
Judgment	69	19
Opinion	74	20
Clerk's certificate	127	33

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States of America, plaintiff in error, and the Central Pacific Railroad Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be' inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102d.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge Ninth Judicial Circuit.

The above writ of error is hereby allowed.

Attest, &c.

[SEAL.] L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Cal'a,
By J. F. O'BEIRNE,
Dep'y Cl'k.

b (Indorsed:) 1379. The United States Supreme Court. The United States of America vs. The Central Pacific Railroad Company. Writ of error. Filed May 9, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit, within and for the district of California:

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk,*
P'r J. F. O'BEIRNE, *Dep'y Cl'k.*

c UNITED STATES OF AMERICA, *ss:*

To the Central Pacific Railroad Company, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Wash-

ington, in the District of Columbia, on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 9th day of May, A. D. 1878, and of the Independence of the United States the 102d.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge 9th Judicial Circuit.

(Indorsed:) 1379. United States Supreme Court. The United States of America vs. The Central Pacific Railroad Company. Citation. Filed 14 May, 1878, L. S. B. Sawyer, cl'k, by J. F. O'Beirne, d'p'y cl'k.

U. S. MARSHAL'S OFFICE,
DIST. OF CALIFORNIA.

I hereby certify that I served a copy of the within citation by personally delivering the same to Leland Stanford, president of the Central Pacific Railroad Company, at the city & county of San Francisco, this 13th day of May, 1878.

A. W. POOLE,
U. S. Marshal,
By W. L. MCEWEN,
Deputy.

1 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States of the ninth circuit, in and for the district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, defendant.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America to the Central Pacific Railroad Company, defendant, greeting:

2 You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover from said company defendant the sum of one million eight hundred and thirty-six thousand six hundred and thirty five $\frac{10}{100}$ dollars, that sum being five per cent. of the net earnings of said railroad company from July 16th, 1869, to the 31st Oc-

tober, 1874, alleged to be due to said United States under and by virtue of an act of Congress of said United States, entitled "An act providing for the collection of moneys due the United States from the Pa-
3 cific Railroad Companies," which said sum, or any part thereof, has not been paid, and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 22d day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety ninth.

[SEAL.] LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

(Endorsed:)

OFFICE OF U. S. MARSHAL, DISTRICT OF CALIFORNIA.

I certify that I received the within summons on the 22d day of April, 1875, and on the 23d day of April, 1875, at the city & county of San Francisco, I personally served the same on the within-named Cen-
4 tral Pacific Railroad Company by delivering to and leaving with E. H. Miller, j'r, the secretary of the said company, a true copy of this summons.

E. P. MARSELLUS,
U. S. Marshal,
By HENRY FINNEGASS,
Deputy.

Filed 23d April, 1875.

L. S. B. SAWYER, *Clk*.
By J. F. O'BEIRNE, *Dep'y Clk*.

Complaint.

5 In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

Now comes the plaintiff above-named, by its attorney, Walter Van Dyke, and complains against the defendant herein, and for cause of complaint alleges and shows the court—

That the Central Pacific Railroad Company, the defendant herein, is, and was at the times hereinafter mentioned a corporation duly organized under and by virtue of the laws of the State of California, and that its principal place of business is in the State and district of California.

6 That for the purpose of aiding the construction of a railroad across the American continent this plaintiff, by an act of the Congress of the United States of America, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and by an act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,'" approved July first, eighteen hundred and sixty-two, approved July 2, 1864; and by

an act entitled "An act to amend an act entitled 'An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to
7 secure to the government the use of the same for postal, military, and other purposes,'" approved July 1, 1862, approved July 2, 1864, approved July 3, 1866, for and in consideration of certain covenants and provisions in said acts mentioned, and upon certain conditions in said acts contained, granted to the Central Pacific Railroad Company of California, a corporation duly organized under the laws of the State of California, the right to lay out, construct, furnish, and maintain a continuous line of railroad from the Pacific coast at or near San Francisco, or the navigable waters of the Sacramento River to the western terminus of the Union Pacific Railroad. And this plaintiff for and in consideration of the covenants and conditions in said acts mentioned, agreed that on the completion and equipment of each and every section of twenty consecutive miles of said railroad, that the Secretary of the Treasury of the United States would issue to the said Central
8 Pacific Railroad Company of California, bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per cent. per annum interest (said interest payable semi-annually) to the amount of forty-eight of said bonds per mile for each such section of twenty miles for one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, and thirty-two of said bonds per mile for all of said railroad constructed east of said last mentioned point and sixteen of said bonds per mile for all of said railroad constructed west of the western base of the Sierra Nevada Mountains.

And said grants in said acts mentioned and said agreement herein, and in said acts mentioned, to issue said bonds of the United States to the said Central Pacific Railroad Company of California, were made upon the express condition, among other things, that said bonds
9 and interest should be wholly paid by said Central Pacific Railroad Company of California, its successors or assigns, at maturity, and that until said bonds and interest were so fully paid and after said railroad was completed, that at least five per centum of the net earnings of said railroad should be annually paid by the said Central Pacific Railroad Company of California, its successors or assigns, to this plaintiff to be applied to the payment of said bonds and interest.

That within the time prescribed by said acts, to wit: within six months from July first, one thousand eight hundred and sixty-two, the said Central Pacific Railroad Company of California duly accepted the grants and franchises in said acts contained, together with all the conditions, limitations, and obligations by said acts imposed, and in accordance therewith did, within said time, file their assent thereto, under the
10 seal of said company, in the Department of the Interior and thereupon entered upon the work of constructing and equipping said railroad line.

That on or about the thirty-first day of October, 1864, the said Central Pacific Railroad Company of California executed an assignment, bearing date on that day, to the Western Pacific Railroad Company, a corporation duly organized under and by virtue of the laws of the State of California, of the rights acquired by said acts of Congress to construct all that portion of said railroad and telegraph from the city of San José to the city of Sacramento, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to the conditions thereof, which assignment was confirmed by the act of Congress approved

March 3, 1865, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Mis-
11 souri River to the Pacific Ocean, and to secure the government the use of the same for postal, military, and other purposes,'" approved July first, eighteen hundred and sixty-two, and to amend an act amendatory thereof, approved July second, eighteen hundred and sixty-four.

That in pursuance of the provisions of said acts of Congress hereinbefore mentioned, and at the completion and equipment of each and every section of twenty miles of said railroad by either of said railroad companies, this plaintiff caused its Secretary of the Treasury to issue and deliver to the said Central Pacific Railroad Company of California, and to its assigns, the Western Pacific Railroad Company (where the latter was entitled thereto under said acts), bonds of the United States of one thousand dollars each, to the amount of forty-eight of said bonds per mile for each such section of twenty miles for one hundred
12 and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, and thirty-two of said bonds per mile for all of said railroad constructed east of said last mentioned point; and sixteen of said bonds per mile for all of said railroad constructed west o the western base of the Sierra Nevada Mountains.

And that between the first day of July, 1862, and the 16th day of July, 1869, this plaintiff, in pursuance of said acts of Congress, caused to be issued and delivered to said railroad companies, in the mode and manner and at the times hereinbefore set forth, said one-thousand-dollar bonds, amounting in the aggregate to the sum of twenty seven millions eight hundred and fifty-five thousand six hundred and twenty dollars.

That no part of said bonds has been paid.

That said railroad mentioned in said acts of Congress and so undertaken to be built by said Central Pacific Railroad Company of
13 California and said Western Pacific Railroad Company was fully completed on the 16th day of July, 1869.

That in pursuance of the provisions of the said acts of Congress hereinbefore referred to, the said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company were, on or about the 23d day of June, 1870, consolidated into one corporation under the corporate name of the Central Pacific Railroad Company, and by such consolidation said Central Pacific Railroad Company, this defendant, became subject to the same terms, restrictions, conditions, and obligations to this plaintiff, which said Central Pacific Railroad Company of California and said Western Pacific Railroad Company were subject to at the time of said consolidation, and said Central Pacific Railroad Company, this defendant, was by said consolidation and by the provisions of said acts of Congress substituted for said companies respect-
14 ively, and became and was and is liable for the performance of all of the conditions, promises, and agreements theretofore undertaken by said companies or by either of them; and by said consolidation this defendant undertook and promised to pay annually to plaintiff upon said bonds hereinbefore mentioned five per centum of the net earnings of said railroad from the time of its completion until the full amount of said bonds so issued to said companies or either of them should be fully paid.

That the net earnings of said railroad since its completion, to wit, from the 16th day of July, 1869, to the 31st day of October, 1874, amount to the sum of thirty-six millions seven hundred and thirty-two thousand seven hundred and two dollars.

That five per cent of said net earnings of said railroad from said 16th day of July, 1869, to said 31st day of October, 1874, amount to the sum of one million eight hundred and thirty-six thousand six hundred and thirty-five dollars and ten cents.

15 That no part of said net earnings of said railroad has been paid, but that the whole of said sum of one million eight hundred and thirty-six thousand six hundred and thirty five dollars and ten cents is now due and owing from defendant to this plaintiff.

That on the 22d day of June, 1874, the Congress of the United States of America passed an act entitled "An act providing for the collection of moneys due the United States from the Pacific Railroad Companies," which said act was on said last mentioned day duly approved by the President of the United States, and then and there became a law; which said law, among other things, directs the Secretary of the Treasury of the United States to require payment of this defendant of all sums of money then due or to become due this plaintiff, for the five per centum of the net earnings of said railroad, provided for in the acts of the

16 Congress of the United States hereinbefore first mentioned.

That said law of June 22d, 1874, also provides that in case the defendant shall neglect or refuse to pay the said five per centum of the net earnings hereinbefore mentioned within sixty days after demand therefor made upon the treasurer of this defendant, that then and in that event, at the expiration of said sixty days the Secretary of the Treasury of the United States shall certify the fact of said neglect or refusal to the Attorney-General of the United States, that the necessary suits might be commenced to recover the same.

That on the 24th day of November, 1874, Mark Hopkins was treasurer of the Central Pacific Railroad Company, this defendant.

That on the said 24th day of November, 1874, and while the said Mark Hopkins was treasurer of said company, as aforesaid, honorable B. H. Bristow, then Secretary of the Treasury of the United States, duly

17 demanded of and from the said Mark Hopkins, treasurer of the Central Pacific Railroad Company, this defendant, the payment of the sum of one million eight hundred and thirty six thousand six hundred and thirty-five dollars and ten cents, being the five per centum of the net earnings of the said railroad of this defendant, since and from the time of its completion of its said railroad, to wit, from the 16th day of July, 1869, to the 31st day of October, 1874; a copy of which said demand is hereunto annexed, marked "Exhibit A," and made part of this complaint.

That this defendant, at the time of said demand, refused and neglected, and ever since has refused and neglected to pay said sum or any part thereof.

That the Secretary of the Treasury of the United States, at the expiration of sixty days after said demand had been made, as hereinbefore mentioned, to wit, on the 25th day of January, 1875, duly certified

18 said demand on, and refusal of, said defendant to the Attorney-General of the United States, as will more fully appear by a copy of said certificate hereunto annexed, marked "Exhibit B," and made a part of this complaint.

That the whole of said sum of one million eight hundred and thirty-six thousand six hundred and thirty-five dollars and ten cents is now due and unpaid.

Wherefore the said plaintiff prays judgment against the defendant herein for the sum of one million eight hundred and thirty-six thousand

six hundred and thirty-five dollars and ten cents, together with interest and costs of suit.

WALTER VAN DYKE,
United States Attorney.

19 EXHIBIT A.

(Copy.)

To Mark Hopkins, the treasurer of the Central Pacific Railroad Company:

The act of Congress approved June 22, 1874, entitled "An act providing for the collection of moneys due the United States from the Pacific Railroad Companies" directs the Secretary of the Treasury to require payment of the railroad companies, their successors and assigns, or the successors or assigns of any or either of said companies, of all sums of money due or to become due the United States for the five per centum of the net earnings provided for by the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, or other purposes," approved July first, eighteen
20 hundred and sixty-two, or by any other act or acts in relation to the companies therein named, or any other such company or companies.

Said act of June 22, 1874, also provides that in case either of said railroad companies shall neglect or refuse to pay the same within sixty days after demand therefor made upon the treasurer of such railroad company, the Secretary of the Treasury shall certify that fact to the Attorney-General.

Now, therefore, I, B. H. Bristow, Secretary of the Treasury, in accordance with the provisions of said act of Congress approved June 22d, 1874, hereby demand of you, Mark Hopkins, the treasurer of the said Central Pacific Railroad Company, payment to the United States, within sixty days after service of this demand upon you, of one million eight hundred and thirty-six thousand six hundred and thirty-five dol-
21 lars and ten cents, being the sum due from said Central Pacific Railroad Company to the United States for the five per centum of its net earnings from the sixteenth day of July, eighteen hundred and sixty-nine, the day of the completion of said Central Pacific Railroad, to the thirty-first day of October, eighteen hundred and seventy-four.

If said Central Pacific Railroad Company shall neglect or refuse to pay the United States said sum of one million eight hundred and thirty-six thousand six hundred and thirty-five dollars and ten cents, within sixty days after service of this demand, I shall certify that fact to the Attorney General in order that the necessary suits and proceedings to collect or otherwise obtain redress in respect of the same may be instituted and prosecuted to a final determination.

In witness whereof I have hereto set my hand and the seal of the Treasury Department this tenth day of November, eighteen hundred and seventy-four.

[SEAL.] (Signed) B. H. BRISTOW,
Secretary of the Treasury.

22 I, Joseph H. Robinson, do certify that on the twenty-fourth day of November, eighteen hundred and seventy-four, I made service of a written demand signed by the Secretary of the Treasury

upon Mark Hopkins, esq., treasurer of the Central Pacific Railroad Company, by leaving with E. W. Hopkins, assistant treasurer, at the office of the treasurer of the Central Pacific Railroad Company in San Francisco, California, said demand, of which the within is an exact counterpart.

(Signed) JOSEPH H. ROBINSON.

23 EXHIBIT B.

(Copy.)

TREASURY DEPARTMENT,
January 25th, 1875.

I, B. H. Bristow, Secretary of the Treasury, do certify that on the twenty-fourth day of November, A. D. 1874, in accordance with the provisions of an act of Congress approved June 22, 1874, I made a written demand, herewith inclosed, upon Mark Hopkins, treasurer of the Central Pacific Railroad Company, for the sum of money due from said railroad company to the United States for the five per centum of its net earnings from the sixteenth day of July, A. D. 1869, the day of its completion, to the thirty-first day of October, 1874, amounting to $1,836,635.10.

I further certify that said railroad company has neglected and refused to pay the same within sixty days after demand therefor, and still neglects and refuses to pay the same.

(Signed) CHAS. F. CONANT,
Acting Secretary of the Treasury.

24 (Endorsed:) Filed April 20th, 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

25 *Demurrer.*

In the circuit court of the United States for the district of California, ninth circuit.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

And now comes the Central Pacific Railroad Company, the defendant herein, and demurs to the complaint of The United States of America, the plaintiff herein, and for cause of demurrer alleges:

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2d. That said complaint is ambiguous, unintelligible, and uncertain.

Wherefore defendant prays to be hence dismissed.

26 Dated San Francisco, July 7th, 1875.

ROBERT ROBINSON,
Attorney for Defendant.

WILSON & WILSON & MCALLISTERS & BERGIN,
Counsel for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

MCALLISTERS & BERGIN,
Of Counsel for Defendant.

(Endorsed:) Service of within demurrer admitted this 7th day of July, A. D. 1875. Walter Van Dyke, att'y for pl'ff. Filed July 7th, 1875. L. S. B. Sawyer, cl'k, by J. F. O'Beirne, dep'y cl'k.

27 *Order that demurrer be withdrawn, &c.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court-room in the city of San Francisco, on Monday, the 26th day of July, in the year of our Lord one thousand eight hundred and seventy-five.

Present, the honorable S. J. Field, associate justice Supreme Court United States; the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES
vs.
THE CENTRAL PACIFIC R. R. CO.

On motion of Cutler McAllister, esq., on behalf of the defendant, ordered demurrer withdrawn and ten days granted to defendant to answer herein.

28 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled action.

Attest my hand and seal of said circuit court this 7th day of May, A. D. 1878.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

29 *Answer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

The answer of the Central Pacific Railroad Company, the above-named defendant, to the complaint of The United States of America, the above-named plaintiff, alleges as follows:

Defendant admits the enactment of the statutes mentioned in the complaint, but denies each and every, all and singular the other allegations of said complaint.

Wherefore defendant prays to be hence dismissed with judgment for its costs.

Dated San Francisco, August 16, 1875.

S. W. SANDERSON,
ROBERT ROBINSON,
Atty's for Def't.

30 JOHN B. FELTON, WILSON & WILSON,
MCALLISTERS & BERGIN.
Counsel for Defendant.

(Endorsed:) Service admitted Aug. 16th, 1875. Walter Van Dyke, U. S. att'y. Filed 16 Aug., 1875. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

31 *Findings.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } Findings.

This cause came on to be tried before the court without the intervention of a jury, a trial by jury having been expressly waived by written stipulation of counsel, duly filed with the clerk of this court, John M. Coghlan, esquire, United States attorney, appearing on behalf of plaintiff, and S. W. Sanderson and S. M. Wilson, esquires, appearing on behalf of defendant, and the testimony taken herein and the arguments of counsel having been heard and duly considered, and
32 the court being sufficiently advised, now finds the following facts, viz:

I. That the Central Pacific Railroad Company of California was, on the first day of July, 1862, and from that date to the 23d day of June, 1870, continued to be a corporation duly organized under the laws of the State of California, and said Central Pacific Railroad Company is one of the railroad corporations mentioned and referred to in the several acts of Congress and joint resolutions hereinafter mentioned, and made a part of these findings.

II. That the Congress of the United States, at the several times stated herein, passed the several acts and joint resolutions hereinafter mentioned and referred to, entitled as follows, and printed in the several volumes and pages below named, which acts are made part of the findings herein; that is to say: "An act to aid in the construction
33 of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, 12 U. S. Statutes at Large, p 489 et seq. "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1st, 1862," approved July 2d, 1864, 13 U. S. Statutes at Large, p. 356 et seq. An act entitled "An act to amend an act entitled 'An act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,"' approved July 1st, 1862," approved July 2,
34 1864, approved July 3, 1866, 14 Stat. at Large, page 79. "Joint resolution for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes," approved April 10, 1869, 16 U. S. Statutes at Large, p. 56 et seq.

III. That within the time prescribed by said first mentioned act, to wit, within six months from July first, one thousand eight hundred and sixty two, the said Central Pacific Railroad Company of California mentioned in said acts duly accepted the grants and franchises in said act contained, together with all the conditions, limitations, and obligations by said acts imposed, and in accordance therewith did within said time file its assent thereto, under the seal of said company, in the Department of the Interior, and thereupon entered upon the work of con-

structing and equipping said railroad line, and said Central Pa-
35 cific Railroad was constructed and equipped under the authority and in pursuance of said acts and said acceptance.

IV. That on the thirty-first day of October, 1864, the said Central Pacific Railroad Company of California executed an assignment, bearing date on that day, to the Western Pacific Railroad Company, a corporation duly organized under and by virtue of the laws of the State of California, of the rights acquired by said acts of Congress, to construct all that portion of said railroad and telegraph from the city of San José to the city of Sacramento, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to the conditions thereof, which assignment was confirmed by the act of Congress approved March 3, 1865, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the govern-
36 ment the use of the same for postal, military, and other purposes,'" approved July first, eighteen hundred and sixty-two, and to amend an act amendatory thereof, approved July second, eighteen hundred and sixty-four, which act is found in vol. 13, Statutes at Large of the United States, page 504, and is hereby referred to and made a part of this finding.

V. That in pursuance of the provisions of the said acts of Congress hereinbefore referred to, the said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company were, on or about the 23d day of June, 1870, consolidated into one corporation, under the corporate name of the Central Pacific Railroad Company, which said corporation is the defendant in this action.

VI. That by direction of the President of the United States a board of engineers and men familiar with railroads was convened to
37 consider and report a standard for the construction of the Pacific railroads, by which the companies should be governed in building the roads and the commissioners appointed under the acts of Congress for the purpose in their examinations and reports upon the roads constructed. In February, 1866, this board reported a standard, which was approved and afterward acted upon by the President.

In their report the board, among other things, say:

"Culverts and abutments for bridges and drains should be of stone, whenever a durable article can be obtained within a reasonable distance, say from five to eight miles, depending upon circumstances; provided that temporary trestles may be adopted upon assurances to the satisfaction of the commissioners that stone abutments will be substituted immediately after the line shall be opened, so that stone can be transported thereon." * * * "A railroad cannot be considered
38 complete until it is well ballasted. If composed of gravel or broken stone, it should be from 12 to 24 inches thick, depending on the lower material. In view of the settling of new embankments, which require time and rains before ballasting can be properly placed, and also in view of the number of miles required by the law to be constructed annually, the perfect finish of the road-bed in this respect must be progressive and the work of time. Yet, it is the opinion of the board that such work of perfecting the ballast must proceed as usual on first-class railroads; otherwise, subsequent sections should not be accepted, because the whole work is not then being carried forward as a great Pacific railroad, such as the law contemplates." The report also specifies what should be required as to location, grades and curves, embankments and excavations, cross-ties, rails, sidings, rolling stock, buildings,

etc. The report, recognizing the impracticability as a business
39 transaction of completing a long line of road like the Pacific Railroad in sections of twenty miles each so that each section shall be brought up to the standard of a first-class road as soon as constructed, made a distinction between a provisional and absolute completion; and this distinction was recognized and acted upon by the President subsequently, who accepted the sections, when constructed up to the temporary standard, provisionally, for the purpose of issuing the bonds to enable the companies to proceed with the work, but with the understanding that the deficiencies should be supplied so as to ultimately bring the whole road as an entirety up to the standard of a first-class road, before a final acceptance as absolutely completed as a whole.

VII. That as each section of twenty miles or more of the road was constructed, the president of the company filed a statement, under
40 oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. Upon a favorable report by the commissioners, the President accepted the section provisionally, and issued to the company the bonds authorized by the statute. This was the course of proceeding till 1868, when it was found that the government might advance all the subsidies upon a road only provisionally accepted in sections, and have no security for its absolute completion, as a whole, up to the standard of a first-class road. The question of the propriety of this course was submitted to the Attorney-General, who rendered an opinion on September 5, 1868, which was to the effect that the course before pursued by the government was in accord-
41 ance with the law, and that the President had authority to appoint commissioners to review that portion of the road which had been accepted provisionally, and to refuse a final acceptance of the road as a whole until all the deficiencies should be supplied, and that sufficient subsidies might be withheld, or other guarantees required of the company to secure absolute completion. The opinion is reported in 12 Op. Att'ys-General at page 477, and is referred to and made a part of this finding. The President thenceforth acted upon this opinion of the Attorney-General, and accepted each section when provisionally completed, leaving the question of the absolute completion of the road, as a whole, to be determined upon examination and report of commissioners to be specially appointed for that purpose.

VIII. That on September 25th, 1868, the President, in pursuance of the opinion of the Attorney-General, appointed a commission of civil engineers to examine the entire road, so far as then provisionally
42 completed, and report upon it in accordance with instructions to be furnished by the Secretary of the Interior. Instructions were prepared, in which, after referring to the standard adopted by the President, a pamphlet copy of which was furnished the Secretary of the Interior, says: "This standard had obvious reference, in the first instance, to a provisional completeness, but assurances were given by the companies that the road, in structure, equipments, and every other particular, should be brought up with all practicable dispatch to the standard prescribed by Congress. The rapid construction of this great national thoroughfare being deemed vitally important, it was not originally considered that in the early stages of the enterprise the standard of absolute completeness of each section should be exacted as a condition precedent to the payment of the subsidy. As the government has

made such munificent advances, it becomes the duty of the Executive, in the present advanced stages of the road, to require that all past omissions shall now be supplied, and that in lieu of temporary structures those which are permanent and substantial shall be erected, and to secure from the companies a strict compliance with all the requirements in regard to the appurtenances of the road. It is believed that the time has now arrived for a thorough revision of the work." * * * * * * "It is proper to state, however, that the department expects that you will make a thorough personal examination of the road so far as it has been built. You will fully report in regard to its location, road-bed, cross-ties, track-laying, ballasting, rolling-stock, repair-shops, station buildings, culverts, bridges, viaducts, turnouts, and all other appurtenances; and what amount of expenditure will be required in order that the road, so far as built, may be rendered in these particulars equal to a full, completed first-class railroad.

IX. That the commissioners mentioned in the eighth finding having completed their examination, made their report on May 14, 1869, in which they point out specifically many particulars in which the road as constructed fails to come up to the standard of a first-class road; and they report an estimate in detail showing that in their opinion to supply such deficiencies on 551 miles of road eastward from Sacramento will require a further expenditure of $4,493,380. They say in their report, with reference to one deficiency, that "east of Truckee Station, and especially up the Humboldt Valley, the road for almost its entire length is wholly without ballast."

X. That on April 10, 1869, Congress passed a joint resolution by which the President was "authorized to appoint a board of eminent citizens, not exceeding five in number, * * * * * to examine and report upon the condition of, and what sum or sums, if any, will be required to complete each of said roads (the Union and Central Pacific Roads) for the entire length thereof to the said terminus, as a first-class railroad, in compliance with the several acts relating to said roads." The President was thereby also "authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States under said acts to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or in lieu of such bonds he may receive as such security an equal amount of first-mortgage bonds of such company." In default of giving such security, the President was authorized to direct the Attorney-General to take such proceedings as might be necessary to protect the interests of the United States in such road, and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made. (16 Stat., 56.) In pursuance of this joint resolution the President appointed a board, which has since been known and styled, as in the resolution, the "board of eminent citizens."

XI. The connecting rail uniting the Central and Union Pacific Railroads was laid on May 11, 1869, and soon thereafter regular through passenger trains between San Francisco and Omaha, carrying the United States mails, and through freight trains, were placed upon said roads, and such trains have run regularly between said points ever since. And on the sixteenth day of July, 1869, and ever since that day, said Central Pacific Railroad and said Western Pacific Railroad have been in fact operated as railroads, and have been able to carry, and have in fact carried, all passengers, freights, mails, troops, supplies, and munitions

of war offered for transportation between the eastern terminus of
47 the Central Pacific Railroad and the Pacific Ocean.

XII. That after the connection of the two roads had been made in the month of September, 1869, and subsequent to the provisional acceptance of the last section on July 15th, as hereinafter stated, the said "board of eminent citizens" commenced the examination of said Central Pacific Railroad in pursuance of said joint resolution, and the instructions given by the Secretary of the Interior. The board, among other things, was furnished with a copy of the said instructions given to the said previous board of engineers, and of their report, and directed to be governed thereby in their examinations, and were further instructed as follows: That you will "not only ascertain and report upon its condition, but will also state what sum or sums, if any, will be required to com-
48 plete it for the entire length thereof, as a first class railroad, in compliance with the several acts of Congress relating thereto." After completing their examination, the board made its report on October 30, 1869, in which it gives a detailed estimate of the cost of work necessary to be done on the Central Pacific Railroad from Sacramento eastward, in order to complete it in accordance with the acts of Congress, amounting in the aggregate to $576,650.

XIII. That pending the action of the said "commission of civil engineers," mentioned in finding 8, on March 22, 1869, the Secretary of the Interior, to secure the proper completion of said railroad as required by law, issued an order to the Commissioner of the General Land Office to withhold all patents for lands to the defendant until further orders, and soon thereafter, as further security, required the said defendant
49 to deposit with the Secretary of the Treasury $4,000,000 of its first-mortgage bonds; which order the defendant complied with in the months of May and June, 1869, and in connection with the deposit of said bonds on June 28, 1869, executed and delivered to said Secretary an instrument in writing, wherein it is, among other things, agreed that "the four millions of dollars of first-mortgage bonds of said company which it has this day deposited with the government * * * are and may and shall be held by the government as security for the completion of the structure and equipment of the road of said company, according to the provisions of the statute * * * * until the President of the United States, on a proper examination of the actual completed road and equipments, shall be satisfied that the same are so completed as a first-class railroad according to law." And further,
50 on failure to so complete the road, "the said bonds shall be held by the government, and shall be disposed of, and the proceeds thereof, if disposed of, applied to the proper completion of said road, its structure, and equipments, as the Government of the United States shall by law direct and provide. And it is further agreed that the lands granted as a portion of the subsidy of said company, for which patents have not been issued, shall also be held in like manner by the Government of the United States as security for the completion and equipment of the said railroad as aforesaid," etc.

XIV. That on July 15, 1869, the Secretary of the Interior transmitted to the President the report, dated May 15, 1869, of the commissioners appointed to examine and report upon a section of twenty and three-tenths miles of the Central Pacific Railroad, this being the last section constructed by said defendant. In his letter transmitting said
51 report to the President for his action, the Secretary says: "I respectfully recommend the acceptance of the same, and that bonds be issued to the company thereon in accordance with the agreement

made with the company, which is to the effect that they deposit their first-mortgage bonds with the Secretary of the Treasury to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the act approved July 1, 1862."

The agreement referred to is the agreement hereinbefore referred to, of date June 28, 1869, which letter and report was returned to the Secretary of the Interior by the President with an indorsement thereon as follows, to wit: "The recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect. U. S. Grant." Recommendations in all respects similar to the last had been made
52 by the Secretary of the Interior to the President as to the reports made upon several preceding sections of the roads, and a similar approval was indorsed thereon by the President. Upon the same day, July 15, 1869, the Secretary of the Interior made a similar recommendation as to the section—commissioner's reports upon the last sections of the Union Pacific Railroad—in which he recommends a similar provisional acceptance of the section, and adds: "Provided, however, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned in my letter to you of the 27th of May last."

This recommendation was approved by the President, and the Secretaries of the Treasury and Interior directed to carry the same into effect. These constitute the last conditional acceptances of sections as pro-
53 visionally completed, and this is the point of time at which the government now claims the roads to have been completed, for the purpose of entitling it to recover five per centum of the net earnings of the roads.

XV. That subsequent to the said provisional acceptance of the last section constructed as stated in finding 14, in September, 1869, the Secretary of the Treasury denied an application of defendant to withdraw the $4,493,380 first-mortgage and government bonds deposited and withheld as security as aforesaid, and declined to surrender any securities so held until the "board of eminent citizens should report."

XVI. That on November 3, 1869, the said board of eminent citizens having in the mean time reported, and it appearing by their report that the amount required to supply deficiencies and complete the work up to the required standard had been reduced since the last commissioner's report from $4,498,380 to $576,650, the Secretary of the
54 Interior so modified his order of March 22, 1869, suspending the issue of patents to lands as to allow patents to one-half the lands—every alternate odd section—to be issued, and soon after allowed the withdrawal of said first-mortgage and other bonds, still retaining as security the other half of the lands.

XVII. That on November 15, 1869, the Secretary of the Interior in his annual report to the President states the condition and circumstance of said railroads; points out particulars wherein deficiencies in the construction still exist; reports the amount found necessary to be expended in completing the road up to the required standard; states the securities held for the purpose of insuring its completion, and adds: "It will thus be perceived that the government has ample means to secure from the companies the faithful performance of their respective engagements."

55 XVIII. That on March 27, 1871, the Secretary of the Interior refused an application by defendant to modify the order of Novem-

ber 3, 1869, continuing the suspension of the issuing of patents to one-half the lands. He concludes his letter of denial as follows: "Before modifying the order suspending the issue of patents on one-half of the lands, I desire a report showing the erroneous location to have been corrected, and that the deficiencies have been supplied. Whenever the company shall express a desire for a further examination of the road, commissioners will be appointed for that purpose." There were also, at various times, other refusals to issue patents by the Secretary of the Interior.

XIX. In 1874 there was a bill pending in the Senate which had passed the House in response to demands of the people of several States
56 interested, providing that the title to the lands granted for railroad purposes should at once be vested in the grantees, in order that the States might tax them. On June 9, 1874, the chairman of the Senate Committee on Railroads, by direction of the committee, transmitted a copy of said bill to the Secretary of the Interior, requesting his view and suggestion with reference to the advisibility of the proposed legislation. On June 17, 1874, the Secretary responded, setting forth the proceedings of the various commissions and the report of deficiencies; the reservation of one-half these lands by Secretary Cox's order as security for completion of the road; that "the Executive had no official information that the deficiencies had been supplied"; that the subsidy bonds had been received in full, and that "this moiety of lands withheld is the only security of the government for the completion of the road as required by law." He then points out a provision in the bill, which
57 he says "ipso facto repeals the said order of Mr. Cox," and suggests that it be so changed as to make the mandatory order to the Commissioner of the Land Office to issue patents "contingent on the Executive's being satisfied that all the deficiencies reported by the said 'eminent citizens' have been supplied, and that the roads are completed as required by law."

XX. That on August 2, 1874, the defendant addressed a communication to the Secretary of the Interior, in which it is stated that "the Central Pacific Railroad is now completed and in successful operation," and it "requests that commissioners be appointed to examine the road with a view to its final acceptance by the United States Government." In pursuance of said request, the President appointed commissioners, and in a letter of instructions to the commissioners, dated September
58 21, 1874, among other things, the Secretary of the Interior says: "On the 30th of October, 1869, 'five eminent citizens' who were appointed commissioners by the President under joint resolution of the 30th of April, 1869, reported certain deficiencies in the construction of the Central Pacific Railroad. The vice-president of the company that constructed the road applied on the 2d ultimo for its re examination to determine whether it has been completed as required by law and the report of said commissioners. * * * * * It will be your duty to examine said road with special reference to the deficiencies above referred to, and to report whether they have been substantially supplied. * * * If they have been, and the road is completed substantially as required by the law and departmental instructions, you will ascertain as near as possible, and report the date of the completion. * * * * If it be not yet completed, you will state what, in your judgment, is neces-
59 sary to such completion." Copies of the report of the preceding commissioners, and of the pamphlet showing the standard adopted by the department, were furnished the commissioners as a part of their instructions.

XXI. That on November 2, 1874, the said commission mentioned in finding 20 reported that the defendant had completed its railroad in conformity to the requirements of the law, and that the date of such completion was October 1, 1874; and further reported that between the date of the report of the last preceding commission, October 30, 1869, and said October 1, 1874, said defendant had expended in making the improvements specified $5,121,037 23.

XXII. That on November 12, 1874, the Secretary transmitted to the President the said report mentioned in the next preceding finding, together with a communication stating the action of the several
60 commissions, and closing as follows: "Regarding the order of Mr. Secretary Cox of November 3, 1869, as a conditional acceptance of said road, and finding that the conditions have since been amply and fully complied with, I respectfully recommend that the Secretary of the Interior be authorized to issue patents to the company for the lands inuring to it, and that said order withholding them be revoked." Upon which communication the President, on November 14, 1874, made and signed the following indorsement: "The within recommendations are hereby approved, the authority asked for conferred, and the order of 3d November, 1869, is revoked." On November 18, 1874, in accordance with said order, the Commissioner of the General Land Office was informed by the Secretary of the revocation of said order, and directed to issue to defendant patents to the remaining lands due.

XXIII. From satisfactory direct evidence, other than the ac-
61 tion of the government and its officers, and other than the reports of said several commissions, the court finds the following additional facts, to wit: That the said Central Pacific Railroad was not in fact completed up to the standard of a first class railroad till the first day of October, 1874; that five hundred and fifty-one miles of said railroad were built during the first five months of the year 1869 in a very hasty and imperfect manner; that cuts and embankments had to be subsequently widened, temporary structures replaced or perfected, the line straightened in some instances, and several new tunnels constructed; that this part of the road was unballasted; that ballasting up to the standard of a first-class railroad is a gradual, progressive work, requiring time to settle the road-bed and rains to compact and consolidate it; that to ballast this road at that time
62 up to the required standard under the existing conditions would have been wholly impracticable; that no road can be called first class until well ballasted; and that the defendant between October 30, 1869, and October 1, 1874, in fact expended in construction, bringing the road up to the standard of a first-class railroad, equipments, etc., $5,657,854; that of this sum, $1,914,681.34 was for wharves and depot buildings at Oakland and San Francisco, $241,490.87 for improvements of depot grounds at Mission Bay, San Francisco, and $105,906.60 for steamer Thoroughfare for ferrying cars across the bay; and that the remainder was expended in various improvements along the whole line, additional equipments, and other work necessary to make it in all respects a first-class road.

XXIV. That in pursuance of the provisions of said acts of Congress hereinbefore mentioned, and at the time of the construction, equipment, and provisional acceptance, as hereinbefore stated,
63 of each and every section of said railroad by either of said railroad companies, this plaintiff issued and delivered to the said

Central Pacific Railroad Company of California and to its assignee, the Western Pacific Railroad Company (where the latter was entitled thereto under said acts), except as in these findings otherwise indicated, when some portions were temporarily withheld as security for the ultimate completion of the road, bonds of the United States of one thousand dollars each to the amount of forty-eight of said bonds per mile for each such section for one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, and thirty-two of said bonds per mile for all of said railroad constructed east of said last-mentioned point, and sixteen of said bonds per mile for all of said railroad constructed west of the western base of the Sierra Nevada Mountains.

XXV. That between the first day of July, 1862, and the 27th
64 day of January, 1870, this plaintiff, in pursuance of said acts of Congress, caused to be issued and delivered to said railroad companies, in the mode and manner and at the times herein set forth, all except five of said one thousand dollar bonds. That the bonds so delivered by plaintiff to said companies amounted in the aggregate to the sum of twenty-seven millions eight hundred and fifty thousand six hundred and twenty dollars.

XXVI. That no part of said bonds has been paid by said defendant, or by any other person or persons for said defendant.

XXVII. That on the 22d day of June, 1874, the Congress of the United States of America passed an act entitled "An act providing for the collection of moneys due the United States from the Pacific Railroad Companies," which said act was on said last-mentioned day duly approved by the President of the United States, and then and
65 there became a law, which said law is printed in volume 18, U. S. Statutes at Large, on page 200, and is hereby referred to and made a part of this finding.

XXVIII. That on the 24th day of November, 1874, Mark Hopkins was treasurer of the Central Pacific Railroad Company, this defendant.

XXIX. That on the said 24th day of November, 1874, and while the said Mark Hopkins was treasurer of said company as aforesaid, honorable B. H. Bristow, then Secretary of the Treasury of the United States, duly demanded of and from the said Mark Hopkins, treasurer of the Central Pacific Railroad Company, this defendant, the payment of the sum of one million eight hundred and thirty-six thousand six hundred and thirty-five dollars and ten cents, claimed by plaintiff as the five per centum of the net earnings of the said railroad of this defendant,
66 since and from the time of the alleged completion of its railroad, to wit, from the 16th day of July, 1869, to the 31st day of October, 1874; that this defendant at the time of said demand refused and neglected, and ever since has refused and neglected, to pay said sum or any part thereof. And no part of the five per centum of the earnings of said railroads has ever been paid by said defendant in pursuance of said acts of Congress herein mentioned or otherwise; that the Secretary of the Treasury of the United States at the expiration of sixty days after said demand had been made as hereinbefore mentioned, to wit, on the 25th day of January, 1875, duly certified said demand on and refusal of said defendant to the Attorney-General of the United States.

XXX. That after said demand and refusal, and said certificate by the Secretary of the Treasury to the Attorney-General, to wit, on April 20, 1875, this action was commenced.

67 CONCLUSIONS OF LAW.

As conclusions of law, the court finds—

1. That the defendant's liability to apply five per centum of the net earnings of the road to the payment of the subsidy bonds issued by the government, and the interest thereon, did not accrue till October 1, 1874, and that the government is not entitled to recover any portion of the net earnings accrued prior to that date.

2. That the five per centum of net earnings accrued since October 1, 1874, had not become due at the time this action was commenced, and the action as to the net earnings accrued since said date is premature.

3. That the defendant is entitled to judgment.

68 Let judgment be entered for defendant.

(Signed) LORENZO SAWYER,
Circuit Judge.

OCTOBER 15th, 1877.

(Endorsed:) Filed May 7th, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

69 *Judgment.*

In the circuit court of the United States of America of the ninth judicial circuit in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 1379.

This cause having come on regularly for trial on the 9th day of February, A. D. 1877, being a day in the February, A. D. 1877, term of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties duly filed with the clerk of said court—John M. Coghlan, esq., U. S. attorney, appearing on behalf of the United States, and
70 S. W. Sanderson and S. M. Wilson, esq's, on behalf of defendant—and the trial having been proceeded with upon the 12th day of said month and term, and witnesses on behalf of the plaintiff and of the defendant having been sworn and examined, and the evidence being closed, the cause after arguments of counsel having been submitted to the court for consideration and decision, and the court after due deliberation having filed its finding in writing and ordered that judgment be entered herein in accordance therewith: Now, therefore, by virtue of the law and by reason of the finding aforesaid, it is considered by the court that the United States of America, plaintiff, take nothing by this action, and that the Central Pacific Railroad Company, defendant, go hereof without day.

Judgment entered the 7th day of May, 1878.

L. S. B. SAWYER,
Clerk.

71 I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above entitled cause. Attest my hand and the seal of said circuit court this 7th day of May, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 7 May, 1878. L. S. B. Sawyer, clerk.

72 *Certificate to judgment roll.*

In the circuit court of the United States, ninth judicial circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein entitled action.

Witness my hand and the seal of said circuit court this 7th day of May, A. D. 1878.

[SEAL.]

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Deputy Clerk.

73 (Endorsed:) Judgment roll. Filed May 7th, A. D. 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

74 *Opinion.*

United States circuit court, ninth judicial circuit, district of California.

THE UNITED STATES
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

The Central Pacific Railroad Company did not become liable to apply five per centum of the net earnings of the Central Pacific Railroad annually to the payment of the subsidy bonds and interest thereon, issued to said company by the United States in pursuance of the acts of Congress authorizing the construction of the said road, till October 1, 1874, the date of the completion of the road, as accepted by the President of the United States, and the day upon which it was, in fact, com-
75 pleted in accordance with the requirements of said acts.

SAWYER, circuit judge:

The following facts are established by the evidence:

By direction of the President, a board of engineers and men familiar with railroads was convened to consider and report a standard for the construction of the Pacific Railroads by which the companies should be governed in building the roads, and the commissioners appointed under the acts of Congress for the purpose, in their examinations and reports upon the roads constructed. In February, 1866, this board reported a standard, which was approved and afterwards acted upon by the President. In their report the board, among other things, says:

"Culverts and abutments for bridges and drains should be of stone, whenever a durable article can be obtained within a reasonable
76 distance, say from five to eight miles, depending upon circumstances; provided that temporary trestles may be adopted upon assurances to the satisfaction of the commissioners that stone abutments will be substituted immediately after the line shall be opened, so that stone can be transported thereon." * * * *

"A railroad cannot be considered complete until it is well ballasted. If composed of gravel or broken stone it should be from 12 to 24 inches thick, depending on the lower material. In view of the settling of new embankments, which require time and rains before ballasting can be properly placed, and also in view of the number of miles required by the law to be constructed annually, the perfect finish of the road-bed in this respect must be progressive and the work of time. Yet, it is the opinion of the board that such work of perfecting the ballast must proceed as
77 usual on first-class railroads; otherwise, subsequent sections should not be accepted, because the whole work is not then being carried forward as a great Pacific Railroad, such as the law contemplates." The report also specifies what should be required as to location, grades and curves, embankments and excavations, cross-ties, rails, sidings, rolling-stock, buildings, etc. The report, recognizing the impracticability as a business transaction of completing a long line of road like the Pacific Railroad in sections of twenty miles each so that each section shall be brought up to the standard of a first-class road as soon as constructed, clearly made a distinction between a provisional and absolute completion; and this distinction was recognized and acted upon by the President subsequently, who accepted the sections, when constructed up to the temporary standard, provisionally, for the purpose of issuing the bonds to enable the companies to proceed with the work, but with
78 the understanding that the deficiency would be supplied so as to ultimately bring the whole road as an entirety up to the standard of a first-class road before a final acceptance as absolutely completed as a whole.

As each section of twenty miles or more of the road was constructed, the president of the company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified and that they might examine and report upon such section. Upon a favorable report by the commissioners, the President accepted the section provisionally, and issued to the company the bonds authorized by the statute. This was the course of proceeding till 1868, when it was found that the government might advance all the sub-
79 sidies upon a road only provisionally accepted in sections, and have no security for its absolute completion, as a whole, up to the standard of a first-class road. The question of the propriety of this course was submitted to the Attorney-General, who rendered an opinion on September 5, 1868, which was to the effect that the course before pursued by the government was in accordance with the law, and that the President had authority to appoint commissioners to review that portion of the road which had been accepted provisionally, and to refuse a final acceptance of the road, as a whole, until all deficiencies should be supplied, and that sufficient subsidies might be withheld, or other guarantees required of the company to secure absolute completion. The opinion is reported in 12 Op. Att'ys General, at page 477, and is referred to as a part of this statement of facts. The President thenceforth
80 acted upon this opinion of the Attorney-General, and accepted each section when provisionally completed, leaving the question of the absolute completion of the road, as a whole, to be determined upon examination and report of commissioners to be specially appointed for that purpose.

On September 25th, 1868, the President, in pursuance of the opinion of the Attorney-General, appointed a commission of civil engineers to ex-

amine the entire road, so far as then provisionally completed, and report upon it in accordance with instructions to be furnished by the Secretary of the Interior. Instructions were prepared, in which, after referring to the standard adopted by the President, a pamphlet copy of which was furnished, the Secretary of the Interior says: "This standard had obvious reference, in the first instance, to a provisional completeness, but assurances were given by the companies that the road, in struct-
81 ure, equipments, and every other particular, should be brought up with all practical dispatch to the standard prescribed by Congress. The rapid construction of this great national thoroughfare being deemed vitally important, it was not originally considered that in the early stages of the enterprise the standard of absolute completeness of each section should be exacted as a condition precedent to the payment of the subsidy. As the government has made such munificent advances, it becomes the duty of the Executive, in the present advanced stages of the work, to require that all past omissions shall now be supplied, and that in lieu of temporary structures, those which are permanent and substantial shall be erected, and to secure from the companies a strict compliance with all the requirements in regard to the appurtenances of the road. It is believed that the time has now arrived for a thorough revision of the work." * * * * *

82 "It is proper to state, however, that the department expects that you will make a thorough personal examination of the road so far as it has been built. You will fully report in regard to its location, road-bed, cross-ties, track-laying, ballasting, rolling-stock, repair-shops, station buildings, culverts, bridges, viaducts, turnouts, and all other appurtenances, and what amount of expenditure will be required in order that the road, so far as built, may be rendered in these particulars equal to a full, completed, first-class railroad."

These commissioners, having completed their examinations, made their report on May 14, 1869, in which they point out specifically many particulars in which the road, as constructed, fails to come up to the standard of a first-class road; and they report an estimate in detail showing that in their opinion to supply such deficiencies on 551 miles of road eastward from Sacramento will require
83 a further expenditure of $4,493,380. They say in their report, with reference to one deficiency, that "east of Truckee Station, and especially up the Humboldt Valley, the road for almost its entire length is wholly without ballast." On April 10, 1869, Congress passed a joint resolution by which the President was "authorized to appoint a board of eminent citizens, not exceeding five in number, * * * to examine and report upon the condition of, and what sum or sums, if any, will be required to complete each of said roads (the Union and Central Pacific roads) for the entire length thereof to the said terminus as a first class railroad, in compliance with the several acts relating to said roads." The President was thereby also "authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States under
84 said acts to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or, in lieu of such bonds, he may receive as such security an equal amount of first-mortgage bonds of such company." In default of giving such security, the President was authorized to direct the Attorney-General to take such proceedings as might be necessary to protect the interests of the United States in such road "and to insure the full

completion thereof as a first-class road, as required by law and the statutes in that case made." (16 Stat., 56.)

In pursuance of this joint resolution the President appointed a board, which has since been known and styled, as in the resolution, the "board of eminent citizens." The connecting rail uniting the Central and Union Pacific Railroads was laid on May 11, 1869, and soon
85 thereafter regular through passenger trains between San Francisco and Omaha, carrying the United States mails, and through freight trains, were placed upon said roads, and such trains have run regularly between said points ever since. Afterward, in the month of September, 1869, and subsequent to the provisional acceptance of the last section, on July 15th, as hereinafter stated, the said "board of eminent citizens" commenced the examination of said Central Pacific Railroad in pursuance of said joint resolution and the instructions given by the Secretary of the Interior. The board, among other things, was furnished with a copy of the said instructions given to the said previous board of engineers and of their report, and directed to be governed thereby in their examinations, and were further instructed as follows: That you will "not only ascertain and report upon its condition, but will also state what sum or sums, if any, will be required to com-
86 plete it for the entire length thereof as a first-class railroad, in compliance with the several acts of Congress relating thereto." After completing their examination, the board made its report on October 30, 1869, in which it gives a detailed estimate of the cost of work necessary to be done on the Central Pacific Railroad from Sacramento eastward, in order to complete it in accordance with the acts of Congress, amounting in the aggregate to $576,650.

Pending the action of the said former "commission of civil engineers," on March 22, 1869, the Secretary of the Interior, to secure the proper completion of said railroad, as required by law, issued an order to the Commissioner of the General Land Office to withhold all patents for lands to the defendant until further orders, and soon thereafter, as further security, required the said defendant to deposit with the Secretary of the Treasury $4,000,000 of its first-mortgage bonds; which
87 order the defendant complied with in the months of May and June, 1869; and in connection with the deposit of said bonds on June 28, 1869, executed and delivered to said Secretary an instrument in writing, wherein it is, among other things, agreed that "the four millions of dollars of first mortgage bonds of said company which it has this day deposited with the government * * are and may and shall be held by the government as security for the completion of the structure and equipment of the road of said company, according to the provisions of the statute, * * * until the President of the United States, on a proper examination of the actual completed road and equipments, shall be satisfied that the same are so completed as a first-class railroad according to law." And further, on failure to so complete the road, "the said bonds shall be held by the government, and
88 shall be disposed of, and the proceeds thereof, if disposed of, applied to the proper completion of said road, its structure and equipments, as the Government of the United States shall by law direct and provide. And it is further agreed that the lands granted as a portion of the subsidy of said company, for which patents have not been issued, shall also be held in like manner by the Government of the United States as security for the completion and equipment of the said railroad as aforesaid," etc. On July 15, 1869, the Secretary of the Interior transmitted to the President the report, dated May 15, 1869,

of the commissioners appointed to examine and report upon a section of twenty and three-tenths miles of the Central Pacific Railroad, this being the last section constructed by said defendant. In his letter transmitting said report to the President for his action, the Secretary says:

"I respectfully recommend the acceptance of the same, and that
89 bonds be issued to the company thereon in accordance with the agreement made with the company, which is to the effect that they deposit their first-mortgage bonds with the Secretary of the Treasury, to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the act approved July 1, 1862." The agreement referred to is the agreement hereinbefore referred to, of date June 28, 1869. Which letter and report was returned to the Secretary of the Interior by the President, with an indorsement thereon as follows, to wit:

"The recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect. U. S. Grant." Recommendations in all respects similar to the last had been made by the Secretary of the Interior to the President as to the reports made upon several preceding sec-
90 tions of the roads, and a similar approval was indorsed thereon by the President. Upon the same day, July 15, 1869, the Secretary of the Interior made a similar recommendation as to the section—commissioners' reports upon the last sections of the Union Pacific Railroad—in which he recommends a similar provisional acceptance of the section, and adds: "Provided, however, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned in my letter to you of the 27th of May last."

This recommendation was approved by the President, and the Secretaries of the Treasury and Interior directed to carry the same into effect. These constitute the last conditional acceptances of sections as provisionally completed, and is the point of time at which the government now claims the roads to have been completed, for the
91 purpose of entitling it to recover five per centum of the net earnings of the roads.

Subsequently, in September, 1869, the Secretary of the Treasury denied an application of defendant to withdraw the $4,493,380 first-mortgage and government bonds deposited and withheld as security as aforesaid, and declined to surrender any security so held until the "board of eminent citizens should report." On November 3, 1869, the said board having in the mean time reported, and it appearing by their report that the amount required to supply deficiencies and complete the work up to the required standard had been reduced since the last commission's report from $4,498,380 to $576,650, the Secretary of the Interior so modified his order of March 22, 1869, suspending the issue of patents to land, as to allow patents to one-half the lands—every alternate odd section—to be issued, and soon after allowed the withdrawal
92 of said first-mortgage and other bonds, still retaining as security the other half of the lands

On November 15, 1869, the Secretary of the Interior, in his annual report to the President, states the condition and circumstances of said railroads; points out particulars wherein deficiencies in the construction still exist; reports the amount found necessary to be expended in completing the road up to the required standard; states the securities held for the purpose of insuring its completion, and adds: "It will thus be

perceived that the government has made ample means to secure from the companies the faithful performance of their respective engagements." On March 27, 1871, the Secretary of the Interior refused, on application by defendant, to modify the order of November 3, 1869, continuing the suspension of the issuing of patents to one-half the lands. He concludes his letter of denial as follows: "Before modifying the order sus-
93 pending the issue of patents on one-half of the lands, I desire a report showing the erroneous location to have been corrected and that the deficiencies have been supplied. Whenever the company shall express a desire for a further examination of the road, commissioners will be appointed for that purpose." There were other refusals to issue patents by the Secretary of the Interior.

In 1874, there was a bill pending in the Senate which had passed the House, in response to demands of the people of several States interested, providing that the title to the lands granted for railroad purposes should at once be vested in the grantees, in order that the States might tax them. On June 9, 1874, the chairman of the Senate Committee on Railroads, by direction of the committee, transmitted a copy of said bill to the Secretary of the Interior, requesting his views and sugges-
94 tions with reference to the advisability of the proposed legislation. On June 17, 1874, the Secretary responded, setting forth the proceedings of the various commissions and the reports of deficiencies; the reservation of one-half these lands, by Secretary Cox's order, as security for completion of the road; that the Executive had no official information that the deficiencies had been supplied"; that the subsidy-bonds had been received in full, and that "this moiety of lands withheld is the only security of the government for the completion of the road as required by law." He then points out a provision in the bill which he says "*ipso facto* repeals the said order of Mr. Cox," and suggests that it be so changed as to make the mandatory order of the Commissioner of the Land Office to issue patents contingent on the Executive's being satisfied that all the deficiencies reported by the said 'eminent citizens' have been supplied, and that the roads are completed as required by law."

95 On August 2, 1874, the defendant addressed a communication to the Secretary of the Interior, in which it is stated that "the Central Pacific Road is now completed and in successful operation," and it "requests that commissioners be appointed to examine the road, with a view to its final acceptance by the United States Government." In pursuance of said request, the President appointed commissioners, and in a letter of instructions to the commissioners, dated September 21, 1874, among other things, the Secretary of the Interior says: "On the 30th of October, 1869, 'five eminent citizens,' who were appointed commissioners by the President under joint resolution of the 30th of April, 1869, reported certain deficiencies in the construction of the Central Pacific Railroad. The vice-president of the company that constructed the road applied on the 2d ultimo for its re-examination, to deter-
96 mine whether it has been completed as required by law and the report of said commissioners. * * * It will be your duty to examine said road with special reference to the deficiencies above referred to, and to report whether they have been substantially supplied. * * * * If they have been, and the road is completed substantially as required by the law and departmental instructions, you will ascertain as near as possible, and report the date of the completion. * * * * If it be not yet completed, you will state what, in your judgment, is necessary to such completion." Copies of the report of

the preceding commissioners and of the pamphlet showing the standard adopted by the department, were furnished the commissioners as a part of their instructions.

On November 2, 1874, the said commission reported that the defendant had completed its railroad in conformity to the requirements of the law, and that the date of such completion was October 1, 1874,
97 and further reported that between the date of the report of the last preceding commission, October 30, 1869, and said October 1, 1874, said defendant had expended in making the improvements specified $5,121,037.23. On November 12, 1874, the Secretary transmitted to the President the said report, together with a communication stating the action of the several commissions, and closing as follows: "Regarding the order of M'r Secretary Cox, of November 3, 1869, as a conditional acceptance of said road, and finding that the conditions have since been amply and fully complied with, I respectfully recommend that the Secretary of the Interior be authorized to issue patents to the company for the lands inuring to it, and that said order withholding them be revoked." Upon which communication the President, on November 14, 1874, made and signed the following endorsement: "The
98 within recommendations are hereby approved, the authority asked for conferred, and the order of 3d November, 1869, is revoked." On November 18, 1874, in accordance with said order, the Commissioner of the General Land Office was informed by the Secretary of the revocation of said order, and directed to issue to defendant patents to the remaining lands due.

Aside from the action of the government and its officials and the report of said several commissions, it satisfactorily appears from the uncontradicted direct testimony of competent engineers that the said Central Pacific Railroad was not in fact completed up to the standard of a first class railroad till the first day of October, 1874; that five hundred and fifty-one miles of said railroad was built during the first five months of the year 1869 in a very hasty and imperfect manner; that cuts and embankments had to be subsequently widened; temporary strac-
99 tures replaced or perfected; the line straightened in some instances, and several new tunnels constructed; that this part of the road was unballasted; that ballasting up to the standard of a first-class railroad is a gradual progressive work, requiring time to settle the road bed, and rains to compact and consolidate it; and that to ballast this road at that time, up to the required standard, under the existing conditions, would have been wholly impracticable; and that no road can be called first class until well ballasted. It also satisfactorily appears from uncontradicted testimony other than the acts of the government and the reports of its said commissioners hereinbefore set forth, that the defendant, between October 30, 1869, and October 1, 1874, in fact expended in construction, bringing the road up to the standard of a first-class railroad, equipments, etc., $5,657,854. Of this sum $1,014,681.34 was for wharves and depot buildings at Oakland and San Fran-
100 cisco, $241,490.87 for improvements of depot grounds at Mission Bay, San Francisco; and $105,906.60 for steamer Thoroughfare, for ferrying cars across the bay. The remainder was expended in various improvements along the whole line, additional equipments, and other work necessary to make it in all respects a first-class road.

Upon the facts of the case as found and stated, two questions have been raised and fully argued:

1. At what point of time was the road so fully completed as to make it obligatory upon the defendant to apply five per centum of the net

earnings of the road to the payment of the bonds issued by the government, and the interest thereon?

2. What constitutes net earnings within the meaning of the act?

101 Upon the first question the government insists that the road was completed, and the obligation to set aside five per centum of the net earnings arose on July 15, 1869, the date of the provisional acceptance of the last section, while the defendant maintains that the road was not completed as a whole until October 1, 1874, the date at which the whole road was accepted by the President as having been fully completed.

The act of Congress and the acceptance by the defendant constitute a contract between the parties, by the terms of which the defendant was required to build and complete such a road as is prescribed in the act—a road "supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all appurtenances of a first-class railroad;" in other words, in all respects a first-class railroad, with all the appropriate equipments and appurtenances. Such a road the de-

102 fendant was bound to build and fully complete, and until so built and completed as a whole, it was not entitled to be discharged from the obligations of the contract to complete the road, or to receive the full consideration which the government on its part undertook to give. So also, in addition to constructing the road, another obligation was imposed on defendant; for the act provides that "after the said road is completed, until said bonds (bonds issued by the government) and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." And this is the clause under which this action is brought. It is plain that the point of time at which the defendant becomes liable to thus apply five per centum of the net earnings is the point of time when it has fully completed the construction of the road as a

103 whole, as an entirety, so that its contract is fully discharged so far as the construction is concerned, and the defendant has thereby become entitled to receive all the consideration therefor which the government undertook to give—the point of time when it becomes entitled to all the lands granted, and all the bonds and other subsidies promised. The clause is "after said road is completed"—not a part or section, but said road. When the road is completed for the purpose of casting the obligation upon the defendant of applying five per centum of the net earnings of the road to the payment of the government bonds and interest, it is also completed for the purpose of entitling it to have the road accepted, and of exonerating it from any further liabilities for construction, and for the purpose of entitling it to receive all the lands and other aid given by the government. The construction of the

104 statute as to the time when the road is completed must be the same when it operates in favor of the defendant as when it operates in favor of the government. If the road was completed on July 15, 1869, so as to make it the duty of the defendant to apply five per centum of its net earnings to the payment of the subsidy bonds and interest, it was completed for the purpose of exonerating the defendant from expending further sums in the construction of the road, and for the purpose of entitling it to all the land granted.

But the statute authorized the President, upon the report of commissioners appointed by him, to determine when the road should be deemed completed. Upon the completion of a section of forty, afterward twenty miles of road, the President of the United States was authorized by

section 4 of the act "to appoint three commissioners to examine the same, and report to him in relation thereto; and if it shall appear
105 to him that forty consecutive miles of said railroad and telegraph line have been completed," etc., "patents shall issue conveying the right and title to said lands to said company," etc. The commissioners were to report "to him"—the President—for his information, and if "it shall appear to him" that the section is completed, then the defendant is to be entitled to the corresponding part of the subsidy. This provision clearly devolves the duty upon the President of determining when the road is completed. This was so held by Mr. Attorney-General Evarts, in an elaborate opinion given to the President for his guidance in 1868, and I think correctly (12 Op. At. G., 177). And this determination of the President I think conclusive, at least upon the government. If so, it settles the question, for there can be no dispute as to what the action of the President, and of the Secretary of the Interior, act-
106 ing under his directions, actually was. The acceptance of sections from time to time as constructed was manifestly provisional—all the latter ones being expressly so in terms upon their face. The whole action of the government is in harmony with this view, and utterly inconsistent with any other, as will be seen by a brief recapitulation of the facts, which speak for themselves. So early as September 25, 1868, the President appointed a commission of civil engineers to examine the entire road, so far as then provisionally accepted, and to report wherein it was not completed up to the standard required by the statute. This commission made a thorough examination, and on May 20, 1869, which is subsequent to laying the connecting rail uniting the two roads, made a minute and exhaustive report, showing that it would require $1,493,389 to bring the 551 miles of the provisionally completed road examined by them up to the required standard. Without
107 waiting for the action of the commission, the Secretary of the Interior, on March 22, 1869, for the purpose of withholding the lands as security for the completion of the road according to the statute, issued an order suspending the issue of all patents to lands due on completion of the road. At this time but a small portion of the lands belonging to the sections provisionally completed had been patented to the defendant, so that this order in fact withheld nearly all the lands to which the defendant was entitled, provided the road was so far completed.

In April, also, Congress authorized the appointment of another commission of eminent citizens to re-examine the road and report deficiencies, and in express terms authorized the President, as further security for the completion of the road, to withhold subsidy bonds, or
108 require the delivery of first-mortgage bonds, or the return of subsidy bonds already received sufficient to insure a full performance of the contract.

Under this authority, so late as June 28, 1869, more than six weeks after the laying of the connecting rail, and after the favorable report of the section commissioners upon the last section constructed had been made, and only two weeks before its conditional acceptance by the Secretary and approval by the President, the Secretary required the defendant to deposit $4,000,000 of its first-mortgage bonds, and to enter into an agreement that the bonds, together with the lands still unpatented, should be held as security for the completion of the road, and it was upon this deposit and agreement that the last section was conditionally accepted, and the subsidy bonds issued, as expressly appears in terms in the recommendation of the Secretary which was approved by

109 the President. In this condition matters stood till the "board of eminent citizens" re-examined the road and reported October 30, 1869, that it would require only $576,650 to complete the road according to the acts of Congress. After this report the Secretary of the Interior deeming one-half the lands ample security for the completion of the road, on November 3, 1869, modified the order of March 22, 1869, so as to permit the alternate sections of lands granted to be patented, retaining the other alternate sections as security; and soon after delivered to defendant the said bonds deposited and withheld as security. Subsequently, on March 24, 1871, the Secretary of the Interior denied an application of the defendant to modify the order of November 3, 1869, whereby one-half of the land was withheld as security for the completion of the work on the ground that it did not yet appear
110 that "the erroneous locations have been corrected and that the deficiencies have been supplied"; but he offered to appoint another commission whenever the defendant should desire it. Other applications for patents were denied.

Again, so late as June 17, 1874, the Secretary of the Interior objected to any legislation by Congress affecting his right to withhold these lands as security until the Executive should be "satisfied that all deficiencies reported by said 'eminent citizens' have been supplied, and that the roads are completed as required by law." Upon application of the defendant, another, and, as it proved to be, a final commission, was appointed September 21, 1874, to report upon the road, and, if completed, the date of such completion; which commission examined the road, and, on November 2, 1874, reported the deficiencies supplied and the
111 road completed, and that the date of its completion was October 1, 1874. Upon the recommendation of the Secretary of the Interior, the President, on November 14, 1874, approved this report and the Secretary's recommendation, and thereupon vacated the order of November 3, 1869, suspending the issue of patents to one half the lands. This recapitulation of the facts shows that at the times mentioned neither Congress, nor the Secretary of the Interior, nor the President regarded the road as completed; that the acceptance of sections was conditional and provisional only, for the purpose of issuing bonds and enabling the companies to proceed with the work; that the government required a subsequent completion up to the standard required by the statute, and at all times retained in its possession and under its control ample security for the completion of the road; that it was not accepted as
112 completed up to the standard required by the statute till November 14, 1874, and that the date of the completion, as fixed by the report of the commission accepted and approved by the President, is October 1, 1874.

No argument can add force to this simple statement of the facts, or shake or quality the conclusions resulting therefrom. If the road was completed on July 15, 1869, as now claimed by the government for the purposes of this action, then the government wrongfully withheld from the defendant all the lands granted to it (except the small portion before that date patented) from July 15, 1869, till November 3, 1869, together with $4,498,380 first-mortgage and subsidy bonds deposited in May and June, and otherwise withheld; and further wrongfully withheld, thereby depriving the defendant of their use, one-half or every alternate section of the lands due, till November 14, 1874—a
113 period of more than five years after the completion of the road, as now claimed by the government. This is the necessary result, unless we adopt one rule of construction as to what constitutes a "com-

pletion of the road" when it is beneficial to the government, and another when the rights of the defendant are considered. It results, then, that if the President of the United States was authorized to determine the question as to when the road was completed, that determination was not made till November 14, 1874, and the time of the completion was October 1, 1874, at which time the liability of the defendant to be called upon to apply five per centum of the net earnings of the road commenced.

But if the decision of the President and action of the government are not conclusive upon the United States upon this point, it is still found as a fact that the said railroad was not in point of fact completed
114 and equipped up to the standard of a first class railroad as required by the statute till October 1, 1874. Five hundred and fifty-one miles of railroad were constructed eastward from the Sierra Nevada Mountains during the five months ending May 11, 1869, to a great extent through a desert, and during the greater part of the year, including all except the earlier part of the period of construction, a rainless region.

The testimony of engineers shows, as also does the report of the engineers appointed by the President to recommend a standard for the construction of the road, that to bring a railroad up to first class as a practical business proceeding requires time after the mere laying of the rails. That a road of one or two thousand miles' length cannot, as a practical business transaction, be completely ballasted, equipped, and supplied with all the conveniences and accommodations of a first class
115 road as a whole, in sections of twenty miles each, hastily constructed, so that each section when so constructed shall be so complete in construction, equipment, and appointment as to fill its place as a part of the whole completed first-class road. That in such cases ordinary practical business economy requires temporary structures to be gradually replaced as they become unfit for use, and ballasting to be a progressive work, affording time for the embankments to settle by use, and to be rendered compact by rains. As a practical business undertaking, it would manifestly be preposterous to expect that five hundred and fifty-one miles of road should be constructed up the Humboldt River, through a rainless desert, in the year 1869, and prior to the fifteenth day of July of that year, and be properly ballasted and "supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other
116 appurtenances of a first-class railroad;" and no such feat was in fact performed. It is true that this number of miles of road was constructed so as to be capable of use, and it was, in fact, in constant use from that time on; but the law requires something more than a road capable of use. It requires in all particulars a first-class road, and the government was not bound to accept anything short of a first-class railroad.

The construction of this road was pushed forward with unprecedented energy and haste for the purpose of getting it open for traffic. When this object was accomplished, the defendants subsequently acted upon sound, practical, economical business principles, and brought the road up to the standard required by connecting locations, widening cuts and embankments, substituting permanent for temporary structures, ballasting, furnishing water-stations, depots, sidings, equipments, etc., by
117 degrees, in the same mode as the testimony shows is usual in the construction and equipment of other extensive first-class roads. The defendant was at that time under no legal obligations to make any

greater haste in bringing the road up to the proper standard than was required by sound practical economical business principles. The law gave defendant nearly seven years after July 15, 1869, within which to complete the road; and the government held in its own hands ample securities to insure its completion, and lost by the delay nothing to which it was entitled under the law or the contract; and the road is, doubtless, better for being gradually brought to the required standard. The road was finally completed and accepted nearly two years before the time required by the statute, and the government cannot complain that the completion was not in due time. It is earnestly urged on
118 behalf of the government that the road was so far completed as to enable the defendant to make a profitable use of it, and since this is so, it ought to be held to be completed for the purpose of requiring the defendant to apply five per centum of the net earnings to the payment of the subsidy bonds and interest. Unfortunately for the argument and the government, the statute does not make the point of time at which the road is capable of use the one at which the liability of defendant to apply five per centum of the net profits to the payment of the subsidy bonds attaches; but the completion of the road—such a road, and no other, as the statute required, and the defendant undertook to build such a road as the government was bound to accept in full satisfaction of this part of the contract. And the defendant is entitled to stand on the terms of the contract. A very inferior road is
119 capable of use, and sometimes of a profitable use, and this road, although as good as could reasonably be expected under the circumstances at that stage of its progress towards completion, was certainly, in many particulars, an imperfect one on July 15, 1869, and for a considerable time thereafter. It was not then completed up to the standard required by the act of Congress, and was not such a road as the government was bound to accept as completed. It was not, in fact, a road completed in any just sense. It is manifest, from the testimony, that the report of the "eminent citizens," of October 30, 1869, is extremely favorable to the defendant; yet this report required the sum of $576,650 to be expended to complete the road; and the government very properly insisted upon the expenditure being made before it would accept it as completed; and it retained in its hands ample means
120 to insure a full performance of the contract on the part of the defendant.

That this report was not unjust to the defendant is evident from the circumstance that defendant did in fact, between the date of said report and October 1, 1874—the date at which the road was accepted by the government as complete—expend the sum of $5,657,854 40, being more than four millions over the sum reported. It is by no means probable that this large sum was unnecessarily expended, and the testimony shows that it was in fact required to bring the road up to the standard of a really first class road, as required by the statute. This is much more than the amount sought to be recovered by the government, and so far as the mere discharging of the contract to build the road is concerned, independent of other considerations, the defendant might well have afforded to pay the $1,800,000 now claimed as five per centum
121 of net profits, if the government had accepted the road as completed on July 15, 1869, and relieved the defendant from the payment of those five millions of dollars and over to complete the road, and had delivered up the bonds and patented the lands withheld as security to which it would then have been entitled. It was manifestly not contemplated by the statute that the defendant should be called

upon to apply five per centum of the net earnings of its road to the payment of the subsidy bonds, so long as it required any portion of its resources to be expended in the work of construction so as to complete the road up to the standard required by the act. The fact that the defendant, by an energetic prosecution of the work, so far constructed the road as to enable it to be used profitably several years before the time provided for its completion, and before its actual completion up
122 to the required standard, has no bearing upon the question at issue. If it did, it would also be found that the government was equally benefitted, for it had the use of the road for all the purposes contemplated by Congress in passing the act during the whole time it was available to the defendant, and as an entirety for more than six years earlier than was called for in the act of Congress; and this direct pecuniary profit to the government, by reducing its expenditures in various ways, if the official reports of the railroad committees of Congress are to be relied on, amounted to several millions of dollars per year; nearly or quite enough to pay the interest on the subsidy bonds.

The government, therefore, has lost nothing by this early use of the incompleted road, but on the contrary has been the gainer of several millions of dollars a year during the whole period of such use. But the question here is not as to the comparative advantages derived
123 by the parties from the building and use of this road; or whether the government did not make a more liberal grant than was necessary; or whether it might not have made a better bargain in other respects; or whether the defendant has or has not obtained a more profitable contract than it ought to have had.

Whatever considerations of this character may be urged elsewhere, when the parties come into a court of justice to seek an adjudication of their rights they stand upon their contract as it is; and the simple, dry question is, what is the contract in fact and in law, and what are the rights of the parties under it? If this were a contract between two natural persons, private citizens, it does not seem possible that there could be any controversy as to the construction to be given to the words "after said road is completed," in relation to the question under consideration; and that the construction would be completed as a whole up to the standard prescribed by the contract, so as to require an
124 acceptance from the other party and a discharge of the party building from any further liability for the purposes of construction. If this would be the natural and proper construction as between private parties, a different one certainly cannot be claimed, admitted, because the government on the one side and a corporation on the other happen to be the parties to the transaction and the contract chances to be found in a statute.

It has been further urged, with some earnestness and apparent sincerity, that the defendant is estopped from denying the completion of the road on July 15, 1869, in consequence of presenting its statements of completion and its claim to have the road accepted as completed, and because it has accepted so much of the consideration from the government as it was able to obtain. But many elements of an estoppel are wanting. The government did not rely upon this statement and
125 accept the road. The statement was only filed in pursuance of the statute as a basis to set in motion the commissions appointed under the act to examine and report to the President. It was the examination and report of the commission upon which the President was authorized to act, and upon which he did in fact act. In this case he not only acted, but refused to accept the road as completed, in accord-

ance with the statute, until November 14, 1874, when he, for the first time, accepted the road as complete and released the securities held to insure completion, which had till that time been withheld from the defendant and which were fully ample to protect the government in case of defendant's default.

My conclusion is that the defendant's liability to apply five per centum of the net earnings of the road to the payment of the subsidy bonds issued by the government and the interest thereon did not accrue
126 till October 1, 1874, and that the government is not entitled to recover any portion of the net earnings accrued prior to that date. The five per centum of the net earnings accrued since October 1, 1874, had not become due at the time this action was commenced. They are to "be annually applied" only. The demand in this case made by the Secretary of the Treasury on defendant was on November 14, 1874, and the suit itself was commenced on April 20, 1875; the former within two and and the latter within seven months after the completion of the road. As to the portion of the net earnings now due, therefore, this action is premature.

There is also a wide difference between the claims of the parties on the other point suggested, as to what constitutes "net earnings" within the meaning of the statute. When it becomes necessary to determine this question it is quite probable that neither party will be found
127 to be wholly right in its construction of the words "net earnings." But under the view I take it will be unnecessary to consider that point now.

Let there be a finding and judgment for the defendant.

(Signed) LORENZO SAWYER,
Circuit Judge.

OCTOBER 15, 1877.

J. M. COGHLAN,
United States Attorney for Plaintiff.
S. W. SANDERSON and S. M. WILSON, *for Defendant.*

(Endorsed:) Read in open court and filed Oct. 15, 1877. L. S. B. Sawyer, cl'k, by J. F. O'Beirne, dep'y cl'k.

UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify the foregoing one hundred and twenty-seven written pages, numbered from 1 to 127, both inclusive, are a full, true, and correct copy of the record and of all the proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 14th day of June, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

(Indorsement on cover:) No. 703. The United States, plaintiff in error, vs. The Central Pacific Railroad Company. California C. C. U. S. Filed 22nd June, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, PLAINTIFFS in error, v. THE CENTRAL PACIFIC RAILROAD Company.	No. 703.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, PLAINTIFFS in error,
v.
THE CENTRAL PACIFIC RAILROAD Company.
No. 703.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

An action was brought in the circuit court under the last clause of the sixth section of the act of July 1, 1862 (12 Stat., 493), which is in these words:

"And after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The act of June 22, 1874 (18 Stat., 200), directed the Secretary of the Interior to demand five per cent. of net earnings from the Pacific Railroad companies chartered by the act of July 1, 1862, and in case of default, the Attorney-General should bring suit. On the refusal of the Central Pacific Company to pay the five per cent. of its net earnings this action was begun. It was alleged by the United States, in the complaint, that the road was completed on July 16, 1869; that the bonds issued in accordance with the fifth section of the act of 1862, and interest thereon, are not paid; and that the company had net earnings each year from the date of completion during the whole period covered by the complaint.

The cause was tried before the court without the intervention of a jury. In the conclusion of law made by the court, it finds that the liability of the company to apply five per centum of the net earnings of the road to the payment of the subsidy bonds did not accrue until October 1, 1874; that the government is not entitled to recover any portion of the net earnings accrued prior to that date; that no five per cent. became due at the time that the action was commenced; and that the defendant was entitled to judgment. Judgment was accordingly entered for the defendant.

The original grants to the Central Pacific Railroad, an organization chartered by California, were made by an act of Congress approved July 1, 1862 (12 Stat., 489). It was amended or affected by the acts approved July, 2 1864 (13 Stat., 356), March 3, 1865 (13 Stat., 573), July 3, 1866 (14 Stat., 79), a joint resolution of April 10, 1869 (16 Stat., 56), and acts approved May 6, 1870 (16 Stat., 121), March 3, 1873 (17 Stat., 508), June 20, 1874 (18 Stat., 111, 112), June 22, 1874 (18 Stat., 200).

Facts.

The Central Pacific Railroad accepted the grants and franchises contained in the act of 1862, with all the conditions, limitations, and obligations therein imposed, within six months after the passage of the act. On the 31st of October, 1862, the Central Pacific Railroad assigned to the Western Pacific Railroad all the rights acquired by the several acts of Congress, to construct that portion of the road from the city of San José to the city of Sacramento. On the 23d day of June, 1870, the Central Pacific and the Western Pacific Railroads were consolidated into one corporation, under the corporate name of "The Central Pacific Railroad Company."

In February, 1866, a board of engineers and railroad men, appointed by the President of the United States, reported a standard for the construction of the Pacific Railroads, by which the companies should be governed in building the roads, and also the commissioners appointed under the acts of Congress. Such portions of the reports which have a bearing upon the question in controversy will be quoted and referred to in the argument. As each section of twenty miles, or more, was constructed, the president of the company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. The commissioners reported from time to time, certifying to the completion of the successive sections of the road, and thereupon, upon the approval of the

The act of June 22, 1874 (18 Stat., 200), directed the Secretary of the Interior to demand five per cent. of net earnings from the Pacific Railroad companies chartered by the act of July 1, 1862, and in case of default, the Attorney-General should bring suit. On the refusal of the Central Pacific Company to pay the five per cent. of its net earnings this action was begun. It was alleged by the United States, in the complaint, that the road was completed on July 16, 1869; that the bonds issued in accordance with the fifth section of the act of 1862, and interest thereon, are not paid; and that the company had net earnings each year from the date of completion during the whole period covered by the complaint.

The cause was tried before the court without the intervention of a jury. In the conclusion of law made by the court, it finds that the liability of the company to apply five per centum of the net earnings of the road to the payment of the subsidy bonds did not accrue until October 1, 1874; that the government is not entitled to recover any portion of the net earnings accrued prior to that date; that no five per cent. became due at the time that the action was commenced; and that the defendant was entitled to judgment. Judgment was accordingly entered for the defendant.

The original grants to the Central Pacific Railroad, an organization chartered by California, were made by an act of Congress approved July 1, 1862 (12 Stat., 489). It was amended or affected by the acts approved July, 2 1864 (13 Stat., 356), March 3, 1865 (13 Stat., 573), July 3, 1866 (14 Stat., 79), a joint resolution of April 10, 1869 (16 Stat., 56), and acts approved May 6, 1870 (16 Stat., 121), March 3, 1873 (17 Stat., 508), June 20, 1874 (18 Stat., 111, 112), June 22, 1874 (18 Stat., 200).

Facts.

The Central Pacific Railroad accepted the grants and franchises contained in the act of 1862, with all the conditions, limitations, and obligations therein imposed, within six months after the passage of the act. On the 31st of October, 1862, the Central Pacific Railroad assigned to the Western Pacific Railroad all the rights acquired by the several acts of Congress, to construct that portion of the road from the city of San José to the city of Sacramento. On the 23d day of June, 1870, the Central Pacific and the Western Pacific Railroads were consolidated into one corporation, under the corporate name of "The Central Pacific Railroad Company."

In February, 1866, a board of engineers and railroad men, appointed by the President of the United States, reported a standard for the construction of the Pacific Railroads, by which the companies should be governed in building the roads, and also the commissioners appointed under the acts of Congress. Such portions of the reports which have a bearing upon the question in controversy will be quoted and referred to in the argument. As each section of twenty miles, or more, was constructed, the president of the company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. The commissioners reported from time to time, certifying to the completion of the successive sections of the road, and thereupon, upon the approval of the

President, the patents for lands were issued by the Secretary of the Interior, and the bonds of the United States by the Secretary of the Treasury. (Rec. p. 12, Finding 7; and Opinion of Attorney-General Evarts (12 Op., 480), which is made a part of Finding 7 by the court.)

On the 11th of May, 1869, the connecting rail uniting the Central and Union Pacific Railroads was laid, and soon afterward regular through-passenger trains between San Francisco and Omaha, and through-freight trains, were placed upon said roads, and such trains have run regularly between said points ever since.

In May and June, 1869, the Central Pacific deposited $4,000,000 of first-mortgage bonds with the Secretary of the Treasury as security for the proper completion of its road, entering into an agreement that the same should be held by the government as security for such completion. It was further agreed that the lands granted as a portion of the subsidy of said company for which patents have not been issued should also be held in like manner by the Government of the United States as security, &c. (Record, p. 14, Finding 13.)

On July 15, 1869, the last sections of the road were accepted. In his letter transmitting the report of the commissions on the section of 20.3 miles to the President for his action, the Secretary of the Interior says: "I respectfully recommend the acceptance of the same, and that bonds be issued to the company thereon in accordance with the agreement made with the company, which is to the effect that they deposit their first-mortgage bonds with the Secretary of the Treasury to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the act approved July 1, 1862." The bonds had

already been deposited. The President of the United States indorsed on this letter:

"The recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

"U. S. GRANT."

Upon the same day, the Secretary of the Interior made a similar recommendation as to the section which was transferred to them by the Union Pacific Railroad, in which he recommends an acceptance of the section upon the same terms as above quoted, and adds: "Provided, however, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the acts mentioned." This recommendation was approved by the President.

It is from this point that the government claims the road to have been completed, for the purpose of entitling it to recover 5 per centum of the net earnings of the road.

On October 30, 1869, the board of eminent citizens appointed by the President in accordance with the joint resolution of April 10, 1869, reported that the estimate of cost of work necessary to be done on the road, in order to complete it in accordance with the acts of Congress, amounted in the aggregate to $576,350.

In November, 1869, the company was allowed to withdraw first-mortgage and other bonds which were held as security for the completion of the road (Record, p. 15, finding xvi). One-half of the patents to land, however,

still were retained. From November, 1869, till August, 1874, the defendant made many requests for an examination of the road, alleging that it was completed and in successful operation. Commissioners were appointed to examine the road, and they reported that the road was completed on October 1, 1874, and after that time the order retaining land-patents was revoked, the President of the United States approving of the recommendation to that effect.

ASSIGNMENT OF ERROR.

The court erred in entering judgment in favor of the defendant.

ARGUMENT.

I.

As the views of the United States on the question whether section 10, act of 1864, in effect repealed or suspended the last clause of section 6, act of 1862, providing for the annual application of 5 per cent. of the net earnings of Pacific Railroads, were presented to the court in No. 736, Union Pacific Railroad Company *vs.* The United States, on appeal from the Court of Claims, it would seem unnecessary to reiterate them here, but they are relied on in this case.

II.

The discussion under the head of "Completion" centers around sections 4, 5, and 6 of the act of July 1, 1862 (12 Stat., 489), as amended by the act of July 2, 1864 (13 Stat., 356), which are as follows:

"SEC. 4. That whenever said company shall have

completed twenty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that twenty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall, in like manner, issue as each twenty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end, which oath shall be taken before a judge of a court of record. And by section 6, act of 1864, the

proviso of section 4, 1862, was further modified as follows:

"And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this act is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor-general for the State of California, instead of being presented to the President of the United Statos; and the said surveyor-general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory."

"SEC. 5. That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of twenty consecutive miles of said railroad

and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest (said interest payable semi-annually), which interest may be paid in United States Treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for each section of twenty miles, and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

"SEC. 6. That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line

in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and one-half of all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par, and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The scheme of completing the road, therefore, was, that it should be constructed in sections, originally of 40 miles, by the act of 1862, but afterward reduced to 20 miles by the act of 1864; that upon the completion of each section the president of the company should make oath thereto before a court of record that the section was completed as required by the act; that upon the presentation of an application, supported by this affidavit, the President was to appoint three commissioners to examine and report upon that section, who are called in this statement "section commissioners"; and that upon their report, if the section was found duly completed as required by law, subsidy bonds and land pat-

ents were to be given in accordance with the provisions of the statute.

The court has found that the president of the Central Pacific did, from time to time, make such affidavits for all the sections of the road. These affidavits were to the effect that each section had been completed as required, specifying the particulars in the language of the statute, "ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad." (Section 4, act 1862.) Commissioners were appointed to examine and report upon the condition of each successive section of the road, and their reports were to the effect that the statements made under oath by the president of the company were correct. Bonds were issued thereupon in accordance with the provisions of law (sections 5, act of 1862, and 6, act of 1864).

The Secretary of the Interior, by letter of July 15, 1869, recommended to the President of the United States that, as the last sections of the road had been reported upon favorably by the commissioners after the sworn representations of the president of the road that such was the case, bonds and land patents should be issued to the Central Pacific Railroad upon the last section to the common terminus of the Union Pacific and Central Pacific roads "at or near Ogden: *Provided, however*, That no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road." The President of the United States approved the recommendation of the Secretary of the

Interior and directed the Secretary of the Treasury and himself to carry the same into effect.

The recommendations of the Secretary of the Interior treat the act to be done by the President as the final act under the provisions for the legal completion of the road, and that the securities granted thereafter would be the property of the road. This transaction imports an agreement intended to secure the United States in all its rights in case the President might have erred in judgment in his acceptance. Whether it, so far as the President is concerned, was *ultra* or *infra vires*, is not important. It is independent of and distinct from the acceptance, and was entered into from great caution by the President and assented to by the company, it may reasonably be presumed, to guard against or to protect him against any error he might have committed in the acceptance made at the request and on the sworn representations of the company. It in no way modified the acceptance, which was complete.

It thus appears that from the 15th of July, 1869, the railroad company was entitled to receive from the United States the subsidy bonds and land patents due upon the last section of the road; lands and subsidy bonds upon the prior sections having already been issued. It has also been found that the company did receive the subsidy bonds upon the whole road during the year 1869. There was nothing in this proviso that authorized the refusal to issue bonds or land patents except "until such security shall be deposited with the Secretary of the Treasury necessary to secure the altimate completion of the road." The security so deposited consisted of first-mortgage bonds and not of land patents.

It should be now stated that the security of bonds recommended by the Secretary of the Interior to be exacted from the Central Pacific Railroad Company was in fact then in the hands of the Secretary of the Treasury to the amount of $4,000,000 of first-mortgage bonds, which had been deposited with him under an agreement of June, 1869, the nature and import of which will be referred to hereafter.

It thus appears that the President of the United States had, on the 15th of July, 1869, accepted every section of the Central Pacific Railroad Company, and that the right of the Central Pacific Railroad Company to the subsidy bonds and the patents for lands granted by the act of 1862 had become vested, and that the Secretary of the Treasury, who was ordered by the President to carry into effect his recommendations of July 15, 1869, as to the delivery of subsidy bonds, had complied with those recommendations.

As the act of 1862 (sections 4, 5, and 6) clearly marks out the conditions and covenants, which are within a narrow limit, to control the undertaking of the construction of the Central Pacific Railroad under governmental patronage, so in the ascertainment of the questions at issue the performance or non-performance only of those conditions and covenants is important.

When the fact of completion of any section of the road was established and declared in the way prescribed in the act, that fact was finally and immovably settled and determined as between the Central Pacific Railroad Company and the United States, and could not be unsettled or changed by any executive authority, nor, except for fraud, by any judicial authority.

It should be noticed that by the provisions of section

6, act of 1864, which modified section 4, act of 1862, that bonds were to be issued and lands patented, for sections of 20 miles, "upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory." Here again the statute points out how the completion of the sections was to be determined, and the bonds and patents issued. From this section of the act of 1864 no inference can arise that the completion of each successive section of the road, and of the whole road, or issue of bonds, depended upon the acceptance of each section by the President. The attempt is made to inject the terms "accepted" and "acceptance by the President" into the statutes, and to use them as warranted by the statutes. These words can have no value in determining the relative rights of the parties to this suit. This conclusion, resulting from the plain interpretation of the language of the statutes, entirely breaks the force of the finding of the court, that the President accepted each section provisionally.

The sections of the act of 1862 as amended fixed the test of a completed railroad. The sectional requirements were those of a first-class railroad, and successive and completed and accepted sections formed, up to and including the last mile-post, the completed railroad. What the President of the United States and the Secretaries and Attorney-General may have decided the company could do in the way of modifying the requirements of the statute as to the elements entering into and necessary for completed sections, the company are now estopped from asserting to the detriment of the rights of the United States. The same statute which provided for the issuing of land patents and subsidy bonds for completed sections made it obligatory upon the president of the

company to make oath that the successive sections had been completed in the manner required by the act, viz, ready for the service contemplated by the acts, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, &c., and all other appurtenances of a first-class railroad, and it was made a condition that the commissioners to examine and report upon the sections should not be appointed by the President of the United States unless the president of the company presented to him this sworn statement.

As without such sworn statements, verified by the commissioners, the President of the United States and Secretary of the Treasury were not permitted by the statute to issue bonds of the United States to the company, so, in receiving the bonds issued on every section thus deriving large pecuniary interest from their delivery, the railroad company is presumed to have complied with the provisions of the act of 1862 in every respect, and to have carried out its part of the contract in good faith. The last section was accepted July 15, 1869, and the bonds subsequently issued bear interest from that date.

THE DECLARATION AND AGREEMENT OF JUNE, 1869.

It has been shown that in June, 1869, an agreement was entered into by the Central Pacific Railroad Company in reference to the deposit of first-mortgage bonds as a guarantee that the construction and equipment of the road should be completed in accordance with the provisions and requirements of law. This agreement was voluntary on the part of the company, and was without any express authority of law. Whatever force

and effect the agreement of June, 1869, may have had, the joint resolution of April 10, 1869 (16 Stat., 56) was of paramount authority in all that related to the deposit of security by the Central Pacific Railroad Company as a guarantee for the completion of the road. The second section provided for the appointment of a board of eminent citizens to examine the Union Pacific and Central Pacific roads, "and report upon the condition of, and what sum or sums, if any, will be required to complete, each of said roads, for the entire length thereof, to the said terminus as a first-class railroad, in compliance with the several acts relating to said roads." Section 3 provided that the President should withhold from each of said companies subsidy bonds sufficient to secure the full completion as a first-class road of all sections of such road upon which bonds had already been issued, or in lieu of such bonds he might receive an equal amount of first-mortgage bonds of such company as such security.

It is quite clear that the only security authorized by the joint resolution of April 10, 1869, to be received by the United States as security for the completion of the whole road, was either subsidy bonds, or, in lieu thereof, first-mortgage bonds of such company. There is no provision in this resolution, and no express provision of law or authority anywhere, authorizing the witholding of patents for lands as security for such completion.

The board of eminent citizens authorized by the joint resolution of April 10, 1869, made their report to the Secretary of the Interior in October, 1869, showing that the road had been substantially completed at that date.

The Secretary of the Treasury, upon the report of the board of eminent citizens, in November, 1869, it must, necessarily be inferred because the road was completed

as required by law, directed that all subsidy bonds deliverable to the road should be delivered (upon the final sections of the road), and that all the first-mortgage bonds which had been deposited in June, 1869, and which had been held after July 15, 1869, as security for the completion of the last sections of the road, should be surrendered to the road.

If anything was necessary in order to a complete acceptance of the road beyond the acceptance by the President of each individual and successive section as it was proved to him to be completed, it was done.

The officer of the government upon whom was devolved the duty of determining whether the proper security had been deposited for the ultimate completion of the road having decided that such security had been deposited, and then having decided that the road was completed, and ordered the surrender of deposited security, determined thereby, for all purposes, that the road was completed; and all officers of the government, as well as the road, are bound by his act.

LETTER OF SECRETARY OF THE INTERIOR OF NOVEMBER 3, 1869, TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

It was not within the proper authority of the Secretary of the Interior to direct the withholding of patents for one-half the lands due the company, as he undertook to do in this letter, nor does it appear to have had the concurrence of the President. The road had acquired an absolute right to the land patents due on the sections prior to and including the one thousandth mile; and for the patents for lands due to the company on the portion of the

road west of the one thousandth mile the Secretary of the Interior, by his letter of July 15, 1869, had decided that the patents for lands should issue, subject only to the condition precedent of the deposit of security, which condition had been performed, as already stated. The Secretary of the Interior could not, therefore, legally interfere with the vested rights of the railroad company, as he attempted to do by his letter of November 3, 1869. His action in writing that letter was like the action of the Secretary of the Treasury directing that the payment for half transportation should be withheld from the Union Pacific and other railroads, because of, and as an offset to, the then alleged claim of the government for reimbursements of money paid for interest on the subsidy bonds. (See U. S. *vs.* Union Pacific R. R. Co., 91 U. S. Rep., pp. 72, 90.) And the refusals of the Secretary of the Interior from time to time, from that date down to November, 1874, to comply with the requests of the railroad company, that he should issue the withheld land patents, were likewise without authority of law, so far as such refusals were made for the purpose of holding such land patents as security for the completion of the road.

These refusals could not affect the position of the road as a road completed for the purposes contemplated by the act.

The claim was continuously made, during the year 1869, by the president of the company, that the road was completed in accordance with the requirements of the statutes, and this was the sworn statement.

Between November, 1869, and August, 1874, the president of the Central Pacific Railroad made repeated applications for the rescinding of the order of Secretary

Cox of November 3, 1869, directing the withholding of patents for half the lands granted by the acts of 1862 and 1864.

Finally, in September, 1874, three commissioners were appointed to examine the Central Pacific Railroad.

The commissioners, after examination, reported that the road was completed as a first-class railroad on October 1, 1874. The approval by the President of the report of this commission, which fixed October 1, 1874, as the day of completion, gave its conclusions no additional validity, and could not of itself be taken as an authoritative determination of the question of the completion of the road, if, by his prior acts, and those of the Secretaries, indicating the completion of the road years before, the obvious intention of the different acts of Congress had been complied with, or if he exceeded his power by fixing a wrong date for the completion of the road, under a mistake of law and fact. The acts of the Executive are to be considered legal only when they are within the general or express authority pointed out by the Constitution and laws.

The President of the United States had taken all the action necessary to conform to the requirements of the statute, and this action showed a completion of every section of the road as early as July 15, 1869. Nowhere does the statute give him the authority to determine the final completion of the road, or the completion of the road as a whole. The authority vested in him was to determine the completion of each section, and the completion that was contemplated by the statute, in sections 4 and 6 now under discussion, was a completion of each and every section of the railroad.

The order of November 3, 1869, withholding one-half

of the patents as security for the completion of the road, was beyond the power of the Secretary of the Interior to issue; so all subsequent action respecting the withholding of the land patents, as far as it was attempted to affect the question of the completion of the road, was illegal and void.

The report of a commission appointed without authority of law, when approved by Secretary and President, and a declaration made on their part that matters stated therein are accepted as true, and certain acts should be done in accordance therewith, can claim no validity on account of this indorsement, especially as everything connected with the commission was plainly not in accordance with any statute, as the Secretary of the Interior himself stated.

As the road was the creature of the statutes, and the only authority and guide for executive action was to be found in such statutes, it becomes of vital importance to the claimant's case to show that the withholding of land patents after July 15, 1869, was in accordance with some statutory provision of law. As this cannot be done, it necessarily follows that such withholding of land patents was unauthorized.

The Central Pacific Railroad Company relies upon the acts of the President of the United States and the Secretary of the Interior after November, 1869, as forming the basis of the claim that the road was not completed, within the meaning of the act of 1862, until October 1, 1874. The action of the parties, as far as it conformed to the act of 1862, however, furnishes him no groundwork for this claim; on the contrary, the evidence showing the sworn statements of completion of successive sections, in accordance with the requirements

of the act, and the performance of the service required over the whole line, the issue of the United States bonds to the company, and other matters before referred to, raises the strongest possible presumption of law that everything which ought to have been done was done. As a necessary conclusion, within the contemplation of the act of 1862, the road was completed at the date of the acceptance of the last section of the road and the issue of the subsidy bonds for the whole road as completed. Certain requirements being observed, the road became completed by operation of law, and not by the action or want of it by the Executive.

It may also be added that the language of section 5, act 1862, "shall *ipso facto* constitute a first mortgage," &c., and "in consideration whereof," &c., taken in connection with the clause of the sixth section, establishes that as the law provides that all the bonds to which the company were ultimately entitled should not be issued unless the successive sections and the whole road were completed, so the issue of bonds on all sections of the road raised a pecuniary obligation on the part of the company to pay five per cent. of its annual net earnings *eo instanti*.

The United States having issued all the bonds provided for by law, as to a completed road, was entitled, under section 6, act 1862, to have five per cent. of net earnings applied annually for their liquidation, the first annual period to begin on the date of the last bond issued.

The statute demanded that when certain acts were done a certain other thing should be the result, and no understanding of the company, outside of the statute, even with United States officials, can avail it to prevent

estopped from operating against the present defense of the company as to the time of completion. A waiver of the condition of the requirements of the successive sections cannot be accepted as a waiver of the result which the statute provided should follow the accomplishment of other conditions, *i. e.*, the completion of the road, for the reason that statutes can only be repealed or legally waived by subsequent statutes, and never by executive action.

This obligation to apply five per cent. of the net earnings, however, is dependent only upon the fact of the completion of the road. It is entirely independent of the fact whether all the subsidy bonds or land patents due have been issued. The fact of the non-issue of such bonds and patents may be a circumstance, with others, tending to show the road was not completed; but if the road was in fact completed, the non-issuing of the bonds and patents would be no excuse for the non-payment of the five per cent. of net earnings, although, as it has been argued, the issue and delivery of the bonds absolutely estops the company from setting up non-completion immediately after such delivery.

THE MEANING OF THE WORDS "COMPLETE," "COMPLETED," AND "COMPLETION."

These words are frequently used in the statutes relating to the Union Pacific Railroad, and always substantially in the same sense as in the 4th section of the act of 1862, where they are used sometimes with the qualification "ready for the service contemplated by this act," or "as required by this act," or "in the manner required by this act," or without limitation, but always in the

same sense. The standard of completion is uniform throughout the acts, accepted by the company, and constituting its charter, and is the same whether in reference to the obligations to be performed or the benefits to be received by the company; whether it is to receive patents for lands, as by the 4th section of the act of 1862, or subsidy bonds, as by the 5th section; or to apply 5 per cent. of its net earnings, as by the 6th section, or to issue its first-mortgage bonds, as by the 10th section of the act of July 2, 1864; or to construct a certain portion of the road by a given time, as by the 7th section of the act of 1862; or so that the cars can be running over the whole length, as by the 12th section of the last-named act; or, as in the provision for the forfeiture of the road, in the 17th section of the act of 1862, where the degree of completion required is that the road shall be completed "ready for use," that is, "ready for the service comtemplated by" the act of 1862; or to deliver the remaining one-third of the bonds on each "fully completed" section, as by section 8, act of 1864.

Section 8, act of 1864, provides for the issue of bonds on sections of road in advance of continuous line of road, two-thirds on a certain proportion of work done, and the remaining one-third to remain until the section is *fully completed* and certified by the commissioners according to the terms and provisions of the act of 1862. This section contains the only recognized provisional completion of a section, if this be such.

The remaining one-third to remain until the section is *fully completed* and certified by the commissioners was a mandatory order upon the Executive and gives an additional legislative interpretation of what was meant by a completed road, as used in section 6, act of 1862. As

no bonds could be issued except on fully completed sections and certificate of commissioners, so the issue of bonds on certificates of commissioners that the sections were completed according to the terms and provisions of the original act absolutely fulfilled the requirements of the act, and estops the company from denying their full force and effect.

A good test of the completed condition of the road on the 6th of November, 1869, is this: Suppose that the road had not been constructed with such rapidity, and that the time had arrived when it was to be forfeited if not completed ready for use, and at that time it was in the precise condition in all respects that it was on the 6th of November, 1869, would the company, under such circumstances, have been found admitting that the road was not completed, and submitting quietly to a forfeiture? Could the United States, under such a condition of things, have obtained a decree of forfeiture?

There was no provision for completion except the completion of all the several and successive sections. That such completion was had was stated upon the oaths and official responsibility of the officers of this road. They cannot now be permitted to deny it. Can it be maintained that, by postponing the issue of half of the land patents, the Secretary of the Interior postponed the completion of the road?

It is to be borne in mind, in considering the question, that the statutes constituting the charter of the railroad company have but one standard of completion, and it also may be well urged that if such completion was sufficient to authorize the company to receive the subsidy bonds, it should and must be sufficient to require it to perform the pecuniary obligations due on such comple-

tion of the road; and that, if such completion was sufficient to permit it to receive the equivalent of upward of twenty-seven millions in subsidy bonds, it should and must be sufficient to require it to pay the small percentage of its net earnings, after the whole road has been so completed. Further, if the company, by representations that its road was completed, upon which the United States acted and delivered to them the subsidy bonds because thereof; or if a standard of completion different from the charter standard was agreed upon, either expressly or impliedly, upon reaching which the railroad company was to receive, and did receive, the subsidy bonds; or if a standard of completion was assumed upon reaching which, with assurances by the railroad company that further sufficient work and money were to be expended on said road, the company received the subsidy bonds and left patents as collateral security for such expenditure; upon either or any of these supposed cases, if the road was accepted as completed by the United States, and the subsidy bonds were delivered or were ready for delivery, and patents for lands were retained by the United States solely by reason of the agreement with the railroad company, then the railroad company would be estopped to deny the completion of the road, or that it had made good its assurances of completion, and the road would in law be deemed so completed, that the company would be liable to pay the 5 per cent. of the net earnings due upon completion of the road, as soon as there were any net earnings upon which the 5 per cent. could be computed.

STANDARD OF CONSTRUCTION FEBRUARY 1, 1866.

The company alleges that the completion reported upon by the section commissioners was only a provis-

ional completion, and not an absolute completion, and offers in support of this allegation the standard of construction adopted by the Secretary of the Interior February 24, 1866, for the whole Pacific Railroad and its branches. This standard, so far as it is consistent with the charter of the company, the Secretary of the Interior, in carrying out the law under the direction of the President, was authorized to adopt. If, however, it in any respect changes, either by raising or lowering, the standard adopted by Congress in the charter of the railroad company, in respect of such changes it is of no validity. Congress can alone alter the law. It was evidently advisable to adopt some standard giving details, as under the statutes millions of dollars of bonds were to be delivered to different corporations, all clamoring for the largest possible amounts, having different section commissioners, and their roads constructed through portions of the country differing vastly in their physical character.

In regard to "*ballast and mechanical structure*," the provisions of the standard were consistent with the charter and with common sense.

As to ballast.—If the best material is not found along the road, the best that can be found is to be used, and best material used, if found, as the work progresses. The perfect finish—not completion, something more—of the road-bed in this respect must be progressive and the work of time. The board further say: "Yet it is the opinion of the board that such work of *perfecting* ballast must proceed as usual on first-class railroads." (Record, p. 11, Finding VI.)

Here is a distinct recognition that the ballast of railroads is not the work of one, two, or three years to

arrive at perfection, but the work of many years. The perfect finish has nothing to do with the completion of a road in such a way as all the work demanded of it can be done. The road will be held to be substantially completed in accordance with the requirements of the charter in this respect when sufficient of the best material is used that the completed sections of the road furnish. If the best material for ballasting a railroad was then found in Massachusetts, it cannot be contended that Congress in providing that the Central Pacific Railroad should be completed in the best manner as a first-class railroad intended to require that the material for its ballast should be transported thither from Massachusetts. A reasonable construction must be given to the provisions of the charter.

The statutes did not require the best possible material, but the best that under the circumstances could be obtained. Granite from the East would be the best material for abutments and masonry generally, but the road was not incomplete because Eastern granite was not imported thither and used in the construction of the abutments.

So it was with the "*mechanical structures.*" Culverts and abutments for bridges and drains were to be of stone if a durable article could be obtained within five or eight miles (Record, Finding VII); but "temporary trestles may be adopted upon assurances to the satisfaction of the commissioners that stone abutments will be substituted immediately after the line shall be open so that stone can be transported thereon." If the completion of the road depended upon the mechanical structures being of stone, then this road may not have been fully completed. But the standard of construction

relied on to contest the assumption of completion provided for the kind of structures which were built along the line of the Central Pacific Railroad.

The attention of the court is called to the opinions of Chief Justice Drake and Judge Davis, of the Court of Claims, in the case of the Union Pacific Railroad Company *vs.* The United States, tried at the December term, 1877, and to be found in the record in No. 736, Supreme Court.

The court (Record, p. 15, Finding XVII) finds "that on November 15, 1869, the Secretary of the Interior, in his annual report to the President, states the condition and circumstances of said railroads; points out particulars wherein deficiencies in the construction still exist; * * * and adds: 'It will thus be perceived that the government has ample means to secure from the companies the faithful performance of their respective engagements.'" If any value is to be attached in the consideration of the question of completion to acts done and reports made by United States officials independent of statutory requirements, it is respectfully submitted that that portion of the report of the Secretary of the Interior mentioned above which refers to the Pacific Railroads, especially the Central Pacific, should be carefully examined by the court. The conclusion seemed to have been reached by the Secretary that the Central Pacific Railroad was completed before the date of his report. The portion relating to the Central Pacific is found in Ex. Doc., second session Forty-first Congress, years 1869–'70, vol. 3, No. 1, Part 3, pages xvi, xvii, and is attached as an appendix to this brief.

CHARLES DEVENS,
Attorney-General.
JOS. K. McCAMMON.

"On the 14th August last, the commissioners appointed under the joint resolution approved 10th April, 1869, were instructed to examine the roads built by this (Union Pacific) and the Central Pacific Railroad Company of California, and to report touching their location, construction, and equipment, and the sums, if any, that would be required to complete each of them for its entire length as a first-class railroad, in compliance with the requirements of Congress.

"The commissioners have submitted their report. They are of opinion that there are no material errors in the general location of this road (Union Pacific), but that the deviations from the accepted line at Promontory and Uintah Mountains should be corrected, and the bridge line at Omaha built so as to avoid the present heavy grade. The road-bed, the larger part of the way, is of proper width, though there are some places where the embankments should be widened. The bridges, culverts, and trestles are generally good structures. Some of the former should be strengthened and some of the latter filled up. * * *

"While the location of the Central Pacific Railroad is, in several places, open to criticism, there are no errors the immediate correction of which, in the opinion of the commissioners, should be required by the government. At a few points the embankments need widening. There are fifteen tunnels on the road, and those which require it are arched with wood. The bridges and trestles are in the same condition as those on the other road. In a distance of forty miles there are thirty-two miles of snow-sheds. The track is well adapted to high rates of speed.

Some additional ballasting is required. The sidings are about five per cent. of the length of the road. The machine-shops are considered sufficient, except at the junction of the two roads. Additional engine-houses are needed. The equipment is in excess of the wants of the road.

"The commissioners estimate the sum required to supply deficiencies at $576,650, and the value of the surplus material at more than $1,000,000.

"The original act required the completion of a continuous line of railway from the Missouri River to the navigable waters of the Sacramento 'by the 1st day of July, 1876.' The energy with which the work was prosecuted has been crowned with signal and unexpected success, as this great national thoroughfare was in use more than seven years before that date. It is not surprising, in view of the unprecedented rapidity with which it was constructed, that deficiencies, most of which are incident to all new roads, should have existed. Each successive report of the special commissioners who were from time to time appointed shows that these deficiencies have been gradually and in a very great degree supplied. The aggregate material and equipment on hand exceed, by $637,250, the amount necessary to make the whole line conform in every respect to the demands of the law and the just expectations of the country. Under the circumstances I had the honor to recommend the acceptance of the last sections."

* * * * * * *

"It will thus be perceived that the government has ample means to secure from the companies the faithful performance of their respective engagements."

ACTS OF CONGRESS

RELATING TO

THE PACIFIC RAILROADS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1878.

ACTS OF CONGRESS

RELATING TO

THE PACIFIC RAILROADS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1878.

CONTENTS.

	Page
Act of July 1, 1862	5
Amendment of July 12, 1862	20
Amendment of July 2, 1864	21
Amendment of March 3, 1865	37
Amendment of July 3, 1866	38
An act relating to the Denver Pacific, March 3, 1869	39
Joint Resolution, April 10, 1869	41
Act of March 3, 1871	42
Act of March 3, 1873	43
Act of June 20, 1874	45
Act of June 22, 1874	46

PACIFIC RAILROAD ACTS.

ACT OF 1862.

AN ACT to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862. 12 Stat., 489.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Walter S. Burgess, William P. Blodgett, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut; Isaac Sherman, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben. Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York; Ephraim Marsh, Charles M. Harker, of New Jersey; John Edgar Thomson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morrell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, jr., of Pennsylvania; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe, Charles McLaughlin, Timothy Dame, John R. Robinson, of California; John Atchison and John D. Winters, of the territory of Nevada; John D. Campbell, R. N. Rice, Charles A. Trowbridge, and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook,

Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa; William B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts; Franklin Gorin, Laban J. Bradford, and John T. Levis, of Kentucky; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon; William Bunn, Jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Brodhead, A. H. Virgin, of Wisconsin; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas; Gilbert C. Monell, and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska; John Evans, of Colorado; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the

Name and title.

name, style, and title of "The Union Pacific Railroad Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph,

Location, &c.

with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act

as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post-office at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and St. Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting; and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation: and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the

Amt. and number of shares of stock altered in sec. 1, act 1864.

Comm'rs, how appointed and to hold meeting.

Treasurer to give bonds, &c.

Books to be kept open. See sec. 2, 1864.

Comm'rs to call meeting of stockholders.

To elect directors. See sec. 13, act of 1864.

Books and property to be delivered to directors.

said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription-books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders, two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the government. Any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of at least five shares of stock in the said company, except the two directors to be appointed by the President, as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations, as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice-president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the direct-

Two directors to be appointed by the President of the U. S.

By act of 1864 altered to five. See sec. 13, 1864.

Amended by sec. 1, 1864.

Company to make by-laws.

Directors to appoint agents, &c.

Directors to require payment of subscriptions. Sec. 2, act of 1864.

Officers to hold for three years altered by sec. 13, 1864.

ors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

Right of way granted.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turn-tables, and water-stations. The United States shall extinguish, as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

See sec. 3, 1864.

U. S. to extinguish Indian titles. Sec. 18, 1864.

Land grants—alternate sections.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *ten* miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all *mineral lands* shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Chang'd to TEN by sec. 4, 1864.

Changed to TWENTY. Sec. 4, 1864.

Minerals and timber. Sec. 4, 1864.

On completion of forty miles [changed to TWENTY by sec. 6, 1864] U. S. com'rs to examine.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all neces-

sary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners, by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented a statement, verified on oath by the president of said company, that such forty miles have been completed in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

And patents of land to issue.

Vacancies in commrs. See sec. 8, act of 1864.

Government bonds. See sec. 8, act 1864, also sec. 10.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest (said interest payable semi-annually), which interest may be paid in United States treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line

Now 20 miles. Sec. 10, 1864.

See sec. 11 of this act, for $32,000 and $48,000 per mile.

Lien of U. S. bonds made subordinate. See sec. 10, act of 1864.

of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

See sec. 10, act 1864.

Modified. See sec. 5, act of 1864.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

Bonds, when and how paid.

Government transportation — half to be paid in cash. See sec. 5, act of 1864.

SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada territory, before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, where-

Assent of company to be filed, &c.

Time of completion extended. See sec. 6, 1864.

See sec. 4, act 1864. Map, &c., designating route to be filed, &c.

upon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: *Provided*, That, in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

Lands designated, &c.

From 100th meridian to Nevada.

SEC. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route through the territories of the United States, to the western boundary of the territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

See sec. 10 of this act.

Kansas Co. to construct road, &c.

SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri River to the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph lines first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall so be located between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed

in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the one hundredth meridian of longitude to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, in the territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, are hereby authorized to construct a rail road and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Central Pacific R. R. Co., of California, authorized to construct road on same terms and conditions.

SEC. 10. *And be it further enacted*, That the said company chartered by the state of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river, as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed; and the said Central Pacific Railroad Company of California shall complete fifty miles of their said road within two years after filing their assent to the provisions of this act, as herein provided, and fifty miles per year thereafter until the whole is completed; and after completing their roads, respectively, said companies, or either of them, may unite upon equal terms with the first named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines, in this act hereinafter mentioned, through the territories from the state of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal and Saint Joseph Railroad, the Pacific Railroad Company of Missouri, and the first named company, or either of them, on filing their assent to this act as aforesaid, may unite upon equal terms,

Time of doing work, &c.

Changed to 25 miles. See sec. 5, act 1864.

Companies may unite in building on equal terms. Sec. 15, 1864, also sec. 16 of this act.

under this act, with the said Kansas company, in construct ing said railroad and telegraph to said meridian of longitude, with the consent of the said State of Kansas; and in case said first named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States* to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

Central Pacific R. R. Co. may continue, &c., to meet other road.

Authority confirmed. See sec. 16, act of 1864, last clause. Also sec. 2, 1866.

Subsidy bonds; treble over the Rocky and Sierra Nevada Mountains.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

Subsidy bonds, double between mountains.

* See section 6, act July 2, 1864. The words "and States intervening" inserted.

Location at State lines and 100 meridian.

SEC. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route; and in case of difference between them as to said location, the President of the United States shall determine the said location,—the companies named in each State and territory to locate the road across the same between the points so agreed upon, except as herein provided.

Track to be of uniform width, &c.

The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific coast;* the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected continuous line; and the companies herein named in Missouri, Kansas, and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and finishing said first-mentioned line between the aforesaid point on the one hundredth meridian of longitude and western boundary of Nevada territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

To be used as continuous line, &c.

H. & St. J. road may be extended, &c.

SEC. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri River, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose use any railroad charter which has been or may be granted by the legislature of Kansas: *Provided*, that if actual survey shall render it desirable, the

* The gauge was subsequently fixed by the following act of Congress:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the gauge of the Pacific Railroad and its branches, throughout their whole extent, from the Pacific coast to the Missouri river, shall be, and hereby is, established at four feet eight and one-half inches.

Approved March 3, 1863.

said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee, and Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

Iowa road from western boundary of Iowa.

SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth

U. P. R. R. Co. required to construct Sioux City road. Sec. 16, act of 1864.

meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

Other companies may connect, &c.

SEC. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

Word company explained.

Companies authorized to consolidate. See sec. 16, act of 1864. Also sec. 10 of this act.

SEC 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line, upon the terms and conditions provided in this act.

Congress may compel speedy completion of road.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned, and to be constructed under the provisions of this act, together with

Main line to be finished in 1876. See secs. 5 and 7, act of 1864.

all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road, and all parts thereof provided for in this act, are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the Treasury until the whole of the road provided for in this act is fully completed; and if the said road, or any part thereof, shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

Repealed. See sec. 7, act of 1864.

Under certain circumstances congress may reduce rates of fare.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures—including repairs, and the furnishing, running, and managing of said road—shall exceed ten per centum upon its cost (exclusive of the five per centum to be paid to the United States), congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this act.

May arrange with telegraph companies now existing.

SEC. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches

as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment, on the part of said railroad companies, of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein. See sec. 15. act of 1864.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth: Companies to make annual report.

First. The names of the stockholders and their places of residence, so far as the same can be ascertained.

Second. The names and residences of the directors, and all other officers of the company.

Third. The amount of stock subscribed, and the amount thereof actually paid in.

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey.

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon.

Seventh. A statement of the expense of said road and its fixtures.

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof; which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.*

*AN ACT relating to filing reports of railroad companies.—[15 Stat. 79.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the reports required to be made to the Secretary of the Treasury on or before the first day of July of each year, by the corporations created by or entitled to subsidies under the provisions of an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and the acts supplemental to and amendatory thereof, shall hereafter be made to the Secretary of the Interior, on or before the first day of October of each year. Said reports shall furnish full and specific information upon the several points mentioned in the twentieth section of the said act of eighteen hundred and sixty-two, and shall be verified as therein prescribed, and, on failure to make the same as herein

12 Stat., 538.

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 2 [1], 1862.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meeting of the commissioners named in the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July second [first], eighteen hundred and sixty-two, and of the five commissioners directed by said act to be appointed by the Secretary of the Interior, shall be held at Bryan hall, in the city of Chicago, in the State of Illinois, on the first Tuesday of September next, at twelve o'clock at noon. A notice of said meeting, to be signed by at least ten of the commissioners named in said act, shall be published at least once a week during the six successive weeks commencing on the twentieth of July, one thousand eight hundred and sixty-two, in one daily newspaper in each of the cities of Boston, New York, Philadelphia, Cincinnati, Chicago, and St. Louis, and no other notice of said meeting shall be requisite.

First meeting of commissioners on Pacific Railroad and telegraph, to be held in Chicago.

Notice.

Approved July 12, 1862.

---

required, the issue of bonds or patents to the company in default shall be suspended until the requirements of this act shall be complied with by such company. And the reports hitherto made to the Secretary of the Treasury, under the said act of July first, eighteen hundred and sixty-two, shall be transferred and delivered by him to the Secretary of the Interior to be filed by him.

* * * * * * *

SEC. 3. *And be it further enacted*, That the reports required from the commissioners appointed to examine and report in relation to the road of any of the corporations whereto reference is made in this act, shall be addressed to and filed in the Department of the Interior; and all such reports heretofore made shall be transferred to and filed in said Department of the Interior; and so much of any and all acts as requires any reports from such companies, or any officers thereof, to be made to the Secretary of the Treasury, is hereby repealed.

SEC. 4. *And be it further enacted*, That, in addition to the eight subjects referred to in section twenty of the act of July, eighteen hundred and sixty-two, to be reported upon, there shall also be furnished annually to the Secretary of the Interior all reports of engineers, superintendents, or other officers who make annual reports to any of said railroad companies.

Approved June 25, 1868.

AMENDMENT OF JULY 2, 1864.

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two. 13 Stat., 356.

Shares of U. P. R. R. Co. changed from $1,000 to $100.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by the government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act, "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby, repealed.

Books to be kept open in several cities. 1860, sec. 2.

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said company (until the entire capital of one hundred millions of dollars shall be subscribed) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and St. Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall, at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The

Per cent. to be paid.

Assessments of stockholders.

How paid.

Amount of capital.

capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company

Stock personal property.

shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the city of New York, or at such other transfer office as the company may establish.

Additional right of way granted. See sec. 2, 1862.

SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any land or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being

Assessment of damages.

more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the land or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court

Payment and title.

of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid.

Appeal.

And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act

Bonds on appeal.

necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such

Costs of appeal.

appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost

incurred by the appellee as well as its own. And the payment into court, for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory or subject to any legal disability, the court may appoint a proper person, who shall give bonds, with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceedings shall be had in reference to the appraisement of the premises to be taken and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of and acquiring a title to the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant or any other person under guardianship to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

Title after appeal.

Absentees and infants.

Unoccupied lands, how acquired.

Damages, how disposed of.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of

Sec. 3, 1862, amended, doubling grant of land.

Sec. 7, 1862, amended, withdrawing land from sale.

said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed 160 acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided, also*, That the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, and notice thereof given at the proper land office.

Coal and iron not minerals.

Certain lands not to be granted.

160 acres only exempted.

Timber to be company's. Sec. 3, 1862.

Other lands exempted.

Time extended one year. Sec. 10, 1862, amended.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated:* and that the

* By joint resolution of Congress, approved March 3, 1865, it is provided: "That all maps, profiles, and other drawings, together with estimates and reports connected with explorations and surveys for the Pacific Road, made under the authority of the government, and all other information upon the subject of said road in the possession of any department of the government, be transferred to the Department of the Interior; and that the Secretary of the Interior be authorized to furnish

Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

25 miles per year. Four years to State line.

Government to pay one-half for services.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this act is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor-general for the State of California, instead of being presented to the President of the United States; and the said surveyor-general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting, after the words "United States," in the last clause, the words "and states intervening."

Sec. 4, 1862, modified, three commissioners, &c.

Affidavit, &c., of C. P. R. R. Co. to be filed in California.

Lands patented. See sec. 4, 1862. Also, sec. 8, this act.

Sec. 10, 1862, amended.

SEC. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed.

Reservation of bonds by sec. 17, 1862, repealed.

copies of the same, free of charge, to the Union Pacific Railroad Company, so far as they may be useful in aiding said company in determining the proper route for said road."

Failure of one company not to affect others. Sec. 17, 1862, altered.

And the failure of any one company to comply fully with the conditions and requirements of this act, or the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required to prepare the road for the superstructure on any such section of twenty miles is done (which said certificate shall be duly verified), the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case exceeding two thirds of the value of the work done. The remaining one third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act. And no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

Partial issue of bonds on uncompleted work. Sec. 11, 1862, modified.

Two-thirds on graded portions. See sec. 6 of this act.

U. P. R. R. Co. cannot receive for more than 300 miles in advance west of Salt Lake City.

SEC. 9. *And be it further enacted*, That, to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road:* *Provided*,

Ferries and bridges.

*AN ACT to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa. (16 Stat., 430.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri

That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company, in such manner as not to impair the usefulness of said river for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor

Roads may connect west of initial point.

No increased amount of bonds &c.

river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled "An act to authorize the construction of certain bridges, and to establish them as post roads," approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto: *And provided*, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws: *Provided, also*, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: *Provided*, That if said bridge shall be constructed as a draw bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw.

Approved February 24, 1871.

shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

First mortgage bonds may have lien, prior to governments.

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches, and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

Sec. 5, 1862, modified.

See sec. 1, act of 1865.

Lien of U. S. bonds to be subordinate, &c.

20 miles instead of 40 miles, as in sec. 5, act of 1862.

Provision for bonds already issued by any companies.

SEC. 11. *And be it further enacted*, That, if any of the railroad companies, entitled to bonds of the United States or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act, issued or shall thereafter issue any of its own bonds or securities in such form and manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds shall be granted, or permitted, as, added to such outstanding, unsatisfied, or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been entitled: *And provided further*, That, before any bonds shall be so given by the United States, the company claiming them shall present to the secretary of the treasury an affidavit of the president and secretary

Affidavit of am't of outstanding company bonds.

of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the secretary of the interior, and any person swearing falsely to any such affidavit shall be deemed guilty of perjury, and, on conviction thereof, shall be punished as aforesaid: *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act.

No land or bonds to go to any co. on road made prior to act of 1862.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall build the railroad from the mouth of Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And, if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad, from the mouth of Kansas river to the one hundredth meridian of longitude, shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any person or company for the construction of any part of the main trunk line of said railroad west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

Leavenworth and Lawrence roads, no bonds.

If built to 100th meridian, may proceed in default of U. P. R. R.

By way of Lawrence and Topeka, or opposite to 100th meridian. West of that line no bonds shall be issued, &c.

Directors, 15; government directors, 5. Sec. 1, 1862, modified.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management, and progress of the work; and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of the road, whether built or surveyed; and, while absent from home, attending to their duties as directors, shall be paid their actual travelling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

One government director on committees.

Government directors to report, &c.

To visit road, &c.

Directors, when elected and where—(Sec. 1, 1862.) for one year.

SEC. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October* next, at the office of said company in the city of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regu-

* Changed by joint resolution approved December 20, 1867, as follows:

JOINT RESOLUTION changing the time of holding the annual meeting of the stockholders of the Union Pacific Railroad Company.—[15 Stat., 243.]

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time of holding the annual meeting of the stockholders of the Union Pacific Railroad Company, for the choice of directors, is hereby changed from the first Wednesday in October to the first Wednesday following the fourth day of March, and the stockholders are authorized to determine the place at which such annual meeting shall be held at the last annual meeting of the stockholders immediately preceding such annual meeting: *Provided*, The same shall be held at either of the cities of New York, Washington, Boston, Baltimore, Philadelphia, Cincinnati, Chicago, or St. Louis: *And provided further*, That on the election of directors herein provided for, to take place in March, Anno Domini eighteen hundred and sixty-eight, the terms of office of all persons then acting or claiming the right to act as directors of said company, shall cease and determine.

lar elections shall be held annually thereafter at the same;* and the directors shall hold their office for one year, and until their successors are qualified.

Road to be used as one continuous line. See sec. 12, act of 1862.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. And it shall not be lawful for the proprietors of any line of telegraph authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each offence, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in

Must telegraph for all persons. See sec. 19, act of 1862.

---

* The second section of the act of July 27, 1868, provides [15 Stat., 243]:

"That any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the act entitled 'An act for the removal of causes in certain cases from state courts,' approved July twenty-seventh, eighteen hundred and sixty-six; and it shall be thereupon the duty of the court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process, and all of the provisions of said act in this section referred to, respecting any bail, attachment, injunction, or other restraining process, and respecting any bond of indemnity or other obligation given upon the issuing or granting of any attachment, injunction, or other restraining process, shall apply with like force and effect in all respects to similar matters, process, or things in the suits for the removal of which this act provides."

any court of the United States, or of any state or territory of competent jurisdiction.

Companies may consolidate. See sec. 16, act of 1862; also sec. 10, 1862.

SEC. 16. *And be it further enacted*, That any two or more of the companies, authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the state or states in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies, respectively at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated, respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case, upon the completion by such consolidated organization of the roads or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the con-

Consolidated companies may build portion of the line left uncompleted by any company.

struction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and things to be done and performed by the government of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may, at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company. And in case any company authorized thereto shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other. *Provided, however,* That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof. It is further provided that, should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California before the line

Powers and duties of consolidated organization.

When Central Pacific Road shall reach eastern line of said State, may go on

150 miles if road not met. Sec. 10, 1862, amended. Also see sec. 2, 1866.

of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first named company, said first named company may extend their line of road eastward one hundred and fifty miles,* on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company.

Sec. 14, 1862, amended as to Sioux City Branch Road.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City, be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa or Minnesota to Sioux City, such company, now organized or as may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union (and) Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construc-

*Amended by the act of July 3, 1866, so as to allow the Central Pacific to continue constructing eastward until it should meet the line of the Union Pacific.

tion of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all the railroad which shall have been constructed by said company shall be forfeited to and become the property of the United States.

Burlington & M. R. R. Co. may extend road, &c.

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the state of Iowa, be, and hereby is, authorized to extend its road through the territory of Nebraska from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude.* And for the purpose of enabling said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine shops, switches, side-tracks, turn-tables, and water-stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

Right o way; &c.

U. S. to extinguish Indian titles.—Sec. 2, 1866.

Land grants to Burlington & M. R. R. Co.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United

* Act of May 6, 1870, authorizes connection to be made at or near the Fort Kearney reservation.

States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior within one year of the date of said acceptance, when the said Secretary shall withdraw the lands embraced in this grant from market.

Burlington & M.R.R.Co lands, &c.

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid; and such examination, report, and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, to fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and St. Joseph's Railroad Company by the said last mentioned act, so far as the same may be applicable: *Provided*, That no government bonds shall be issued to the said Burlington and Missouri River Railroad Company to aid in the construction of said extension of its road; and provided further, that said extension shall be completed within the period of ten years from the passage of this act.

Bonds.

Land not to be conveyed to any company until they pay cost of survey &c. Sec. 4, 1862. Sec. 6, 1864.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or party in interest as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office, for the prosecution of the survey of the public lands along the line of said

road, and so from year to year, until the whole shall be completed, as provided under the provisions of this act.*

Sec. 18, 1864.

SEC. 22. *And be it further enacted*, That Congress may at any time, alter, amend, or repeal this act.

Approved July 2, 1864.

AMENDMENT OF MARCH 3, 1865.

13 Stat., 573.

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and to amend an act amendatory thereof, approved July second, eighteen hundred and sixty-four.

May issue bonds 100 miles in advance of completed line, interest payable in any lawful money. Sec. 10, 1864.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section ten of said act of July second, eighteen hundred and sixty-four, be so modified and amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company, of California, the Union Pacific Railroad Company, the Union Pacific Railroad Company, eastern division, and all other companies provided for in the said acts of the second of July, eighteen hundred and sixty-four, to issue their six per centum thirty years' bonds, interest payable in any lawful money of the United States, upon their separate roads. And the said companies are hereby authorized to issue, respectively, their bonds to the extent of one hundred miles in advance of a continuous completed line of construction.

Assignment confirmed to San Jose and Sacramento Road.

SEC. 2. *And be it further enacted*, That the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of said state, of the right to construct all that portion of said railroad and telegraph from the city of San Jose to the city of Sacramento, is hereby ratified and confirmed to the said Western Pacific Railroad Company, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof: *Provided*, That the

*In the act of July 15, 1870, which, among many other appropriations, contains those for the survey of the public lands within the limits of the grant of this company in Colorado, Wyoming, and Utah, it is "*Provided*, That the foregoing appropriations for the surveys of public lands within the limits of the Union Pacific Railroad Company's land grant shall be conditional upon the compliance of said company or party in interest with the requirements of the twenty-first section of the act of July second, eighteen hundred and sixty-four."

time within which the said Western Pacific Railroad Company shall be required to construct the first twenty miles of their said road shall be one year from the first day of July, eighteen hundred and sixty-five, and that the entire road shall be completed from San Jose to Sacramento, connecting at the latter point with the said Central Pacific Railroad, within four years thereafter.

Approved March 3, 1865.

AMENDMENT OF JULY 3, 1866.

14 Stat., 79. AN ACT to amend an act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, eastern division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: *Provided*, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the one hundredth degree of longitude, as now required by law: *And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado.

U. P. R. R. to proceed till met. SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road from Omaha, in Nebraska territory, westward, according to the best and most practicable route and without reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet

and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific Railroad;* *Provided*, That each of the above named companies shall have the right, when the nature of the work to be done, by reason of deep cuts and tunnells, shall for the expeditious construction of the Pacific Railroad require it, to work for an extent of not to exceed three hundred miles in advance of their continuous completed line.

Central Pacific may continue their road eastward, with consent of Secretary of the Interior till met by U. P. R. R. Co. Sec. 10, 1862, and sec. 16, 1864, amended.

Approved July 3, 1866.

AN ACT RELATING TO THE DENVER PACIFIC, MARCH 3, 1869.

AN ACT to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado. 15 Stat., 324.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be,

* The two companies having agreed in general terms upon the point of junction of the two roads, Congress passed [16 Stat., 121]—

AN ACT to fix the point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned, viz., Section thirty-six of township seven, of range two, situate north and west of the principal meridian and base line in the territory of Utah, and sections twenty-five, twenty-six, and thirty-five of township seven, of range two and section six of township six, and sections thirty and thirty-one of township seven, of range one, and sections one and two of township six, of range two, all situate north and west of said principal meridian and base line; and said companies are hereby authorized to enter upon, use, and possess said sections, which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads: *Provided, however*, That the Secretary of the Interior shall designate a section of land in said township seven, of range two, belonging to said companies, and reserve the same for the benefit of schools in said territory, in accordance with the act of February twenty-one, eighteen hundred and fifty-five, establishing the office of Surveyor-General of Utah, and to grant land for school and university purposes: *Provided, also*, That said companies shall pay for any additional lands acquired by this act at the rate of two dollars and fifty cents an acre: *And provided further*, That no rights of private persons shall be affected by this act.

Approved May 6, 1870.

and it hereby is authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SEC. 2. *And be it further enacted*, That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division, but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

SEC. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division; *Provided*, That neither of the Companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this act.

Approved March 3, 1869.

JOINT RESOLUTION OF APRIL 10, 1869.

JOINT RESOLUTION for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes. 16 Stat., 56.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the stockholders of the Union Pacific Railroad Company, at a meeting to be held on the twenty-second day of April, eighteen hundred and sixty-nine, at the city of Boston (with power to adjourn from day to day), shall elect a board of directors for the ensuing year; and said stockholders are hereby authorized to establish their general office at such place in the United States as they may select at said meeting: *Provided*, That the passage of this resolution shall not confer any other right upon said Union Pacific Railroad Company than to hold such election, or be held in any manner to relinquish or waive any rights of the United States to take advantage of any act or neglect of said Union Pacific Railroad Company heretofore done or omitted whereby the rights of the general government have been or may be prejudiced: *And provided further*, That the common terminus of the Union Pacific and the Central Pacific railroads shall be at or near Ogden: and the Union Pacific Railroad Company shall build, and the Central Pacific Railroad Company pay for and own, the railroad from the terminus aforesaid to Promontory Summit, at which point the rails shall meet and connect and form one continuous line.

Stockholders of Union Pacific R. R. Co. to elect a board of directors.

To establish their general office.

No other right conferred or waived hereby.

Common terminus of the Union Pacific and Central Pacific railroads to be at or near Ogden, &c.

SEC. 2. *And be it further resolved*, That to ascertain the condition of the Union Pacific Railroad and the Central Pacific Railroad, the President of the United States is authorized to appoint a board of eminent citizens, not exceeding five in number, and who shall not be interested in either road, to examine and report upon the condition of, and what sum or sums, if any, will be required to complete, each of said roads, for the entire length thereof, to the said terminus as a first-class railroad, in compliance with the several acts relating to said roads, and the expense of said board, including an allowance of ten dollars to each for their services for each day employed in such examination or report, to be paid equally by said companies.

The President to appoint a commission to examine and report upon the roads.

Expenses and pay of commissioners.

SEC. 3. *And be it further resolved*, That the President is hereby authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States under said acts sufficient to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or

Subsidy bonds to be withheld sufficient to secure the full completion, as a first-class road, of all sections of such road, &c.

in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company; and if it shall appear to the President that the amount of subsidy bonds yet to be issued to either of said companies is insufficient to insure the full completion of such road, he may make requisition upon such company for a sufficient amount of bonds already issued to said company, or in his discretion of their first mortgage bonds, to secure the full completion of the same. And in default of obtaining such security as [is] in this section provided, the President may authorize and direct the Attorney-General to institute such suits and proceedings on behalf and in the name of the United States, in any court of the United States having jurisdiction, as shall be necessary or proper to compel the giving of such security, and thereby, or in any manner otherwise, to protect the interests of the United States in said road, and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made.

If the amount to be issued is insufficient, &c.

Attorney-General to institute necessary suits.

SEC. 4. *And be it further resolved*, That the Attorney-General of the United States be, and he is hereby, authorized and directed to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company have not been forfeited, and to institute all necessary and proper legal proceedings; also, to investigate whether or not said companies have or have not made any illegal dividends upon their stock, and if so to institute the necessary proceedings to have the same reimbursed; and also to investigate whether any of the directors or any other agents or employés of said companies have or not violated any penal law, and if so to institute the proper criminal proceedings against all persons who have violated such laws.

Attorney-General to investigate whether the charter of the Union Pacific and Central Pacific railroads have not been forfeited, &c.

To institute criminal proceedings, if, &c.

Approved April 10, 1869.

ACT OF MARCH 3, 1871.

* * * * * * *

16 Stat., p. 525

SEC. 9. That, in accordance with the fifth section of the act approved July two, eighteen hundred and sixty four, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and

sixty two," the Secretary of the Treasury is hereby directed to pay over in money to the Pacific Railroad companies mentioned in said act, and performing services for the United States, one half of the compensation at the rate provided by law for such services, heretofore or hereafter rendered: *Provided*, That this section shall not be construed to affect the legal rights of the government or the obligations of the companies, except as herein specifically provided.

ACT OF MARCH 3, 1873.

AN ACT making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1874, and for other purposes. 17 Stat., 508.

* * * * * * *

Secretary of the Treasury to withhold payments to certain railroad companies for freight, &c.

SEC. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied as provided by law: and any such company may bring suit in the court of claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them, and either party to such suit may appeal to the supreme court; and both said courts shall give such cause or causes precedence of all other business.

Companies may bring suit in court of claims.

Appeal to supreme court. Causes to have precedence.

* * * * * * *

Attorney-General to bring suit in equity against the Union Pacific Railroad Company and all persons who, &c.

SEC. 4. That the Attorney-General shall cause a suit in equity to be instituted in the name of the United States against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity, or who may have received as profits or proceeds of contracts for construction or equipment of said

road, or other contracts therewith, moneys or other property which ought in equity to belong to said railroad corporation, or who may, under pretence of having complied with the acts to which this is an addition, have wrongfully and unlawfully received from the United States bonds, moneys, or lands which ought in equity to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall in equity be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees and issue such process as it shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district. The books, records, correspondence, and all other documents of the Union Pacific Railroad Company, shall at all times be open to inspection by the Secretary of the Treasury, or such persons as he may delegate for that purpose. The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation. No dividend shall hereafter be made by said company but from the actual net earnings thereof; and no new stock shall be issued, or mortgages or pledges made on the property or future earnings of the company, without leave of Congress, except for the purpose of funding and securing debt now existing, or the renewals thereof. No director or officer of said road shall hereafter be interested, directly or indirectly, in any contract therewith, except for his lawful compensation as such officer. Any director or officer who shall pay or declare, or aid in paying or declaring, any dividend, or creating any mortgage or pledge prohibited by this act, shall be punished by imprisonment not exceeding two years, and by fine not exceeding five thousand dollars. The proper circuit court of the United States

Suit to be brought in any circuit court.

Decrees.

New parties, &c.

Writs of subpœna to run into any district, and how served.

Books of the railroad company to be open to inspection.

Bankrupt laws not to apply.

Dividends, new stock, mortgages, &c.

No director to be interested in any contract, except, &c.

Penalty.

shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law. Jurisdiction of circuit court to issue mandamus.

Approved March 3, 1873.

ACT OF JUNE 20, 1874.

AN ACT making additions to the fifteenth section of the act approved July 2, 1864, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862." 18 Stat., 111.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be, and is hereby, added to the fifteenth section of the act approved July second, eighteen hundred and sixty-four, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," the following words, namely: "And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and may be imprisoned not less than six months. In case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act and the acts to which this act is amendatory, the party injured or the company aggrieved may bring an action in the district or circuit court of the United States, in the territory, district, or circuit in which any portion of the road of the defendant may be

Certain road to be operated as continuous line with equal facilities.

Agents or officers to be fined in case of refusal.

Union Pacific Company to be sued in case of refusal.

situated, for damages on account of such failure or refusal; and, upon recovery, the plaintiff shall be entitled to judgment for treble the amount of all excess of freight and fares collected by the defendant, and for treble the amount of damages sustained by the plaintiff by such failure or refusal; and for each and every violation of or failure to comply with the requirements of this act, a new cause of action shall arise; and in case of suit in any such territory, district, or circuit, process may be served upon any agent of the defendant found in the territory, district, or circuit in which such suit may be brought, and such service shall be by the court held to be good and sufficient; and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine.

Penalty fixed.

Approved June 20, 1874.

ACT OF JUNE 22, 1874.

18 Stat., 200.

AN ACT providing for the collection of moneys due the United States from the Pacific Railroad Companies.

Secretary of the Treasury to demand five per cent. of net earnings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and hereby is, directed to require payment of the railroad companies, their successors and assigns, or the successors or assigns of any or either of said companies, of all sums of money due, or to become due, the United States for the five per centum of the net earnings provided for by the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, or by any other act or acts in relation to the companies therein named, or any other such company or companies; and in case either of said railroad companies shall neglect or refuse to pay the same within sixty days after demand therefor made upon the treasurer of such railroad company, the secretary of the treasury shall certify that fact to the Attorney-General, who shall thereupon institute the neces-

Attorney-General to bring suit.

sary suits and proceedings to collect, and otherwise obtain redress in respect of the same, in the proper circuit courts of the United States, and prosecute the same, with all convenient dispatch, to a final determination.

Approved June 22, 1874.

ACT OF MAY 7, 1878.

CHAP. 96.—An act to alter and amend the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act. 20 Stat., 56.

Whereas, on the first day of July, anno Domini eighteen hundred and sixty-two, Congress passed an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;" and

Whereas afterward, on the second day of July, anno Domini eighteen hundred and sixty-four, Congress passed an act in amendment of said first-mentioned act; and

Whereas the Union Pacific Railroad Company, named in said acts, and under the authority thereof, undertook to construct a railway, after the passage thereof, over some part of the line mentioned in said acts; and

Whereas, under the authority of the said two acts, the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, undertook to construct a railway, after the passage of said acts, over some part of the line mentioned in said acts; and

Whereas the United States, upon demand of said Central Pacific Railroad Company, have heretofore issued, by way of loan and as provided in said acts, to and for the benefit of said company, in aid of the purposes named in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half yearly, to the amount of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars, which said bonds have been sold in the market or otherwise disposed of by said company; and

Whereas the said Central Pacific Company has issued and disposed of an amount of its own bonds equal to the amount

so issued by the United States, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas, after the passage of said acts, the Western Pacific Railroad Company, a corporation then existing under the laws of California, did, under the authority of Congress, become the assignee of the rights, duties and obligations of the said Central Pacific Railroad Company, as provided in the act of Congress passed on the third of March, anno Domini eighteen hundred and sixty-five, and did, under the authority of the said act and of the acts aforesaid, construct a railroad from the city of San Jose to the city of Sacramento, in California, and did demand and receive from the United States the sum of one million nine hundred and seventy thousand five hundred and sixty dollars of the bonds of the United States, of the description before mentioned as issued to the Central Pacific Company, and in the same manner and under the provisions of said acts; and upon and in respect of the bonds so issued to both said companies, the United States have paid interest to the sum of more than thirteen and a half million dollars, which has not been reimbursed; and

Whereas said Western Pacific Railroad Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States to it, and secured the same by mortgage, which are, if lawfully issued and disposed of, a prior and paramount lien to that of the United States, as stated and secured thereby; and

Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby the said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company; and

Whereas the United States, upon the demand of the said Union Pacific Railroad Company, have heretofore issued by way of loan to it and as provided in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half-yearly, the principal sums of which amount to twenty-seven million two hundred and thirty-six thousand

five hundred and twelve dollars; on which the United States have paid over ten million dollars interest over and above all reimbursements; which said bonds have been sold in the market or otherwise disposed of by said corporation; and

Whereas said corporation has issued and disposed of an amount of its own bonds equal to the amounts so issued to it by the United States as aforesaid, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than ninety-six million dollars, and those of the said Union Pacific Railroad Company to more than eighty-eight million dollars; and

Whereas the United States, in view of the indebtedness and operations of said several railroad companies respectively, and of the disposition of their respective incomes, are not and cannot, without further legislation, be secure in their interests in and concerning said respective railroads and corporations, either as mentioned in said acts or otherwise; and

Whereas a due regard to the rights of said several companies respectively, as mentioned in said act of eighteen hundred and sixty-two, as well as just security to the United States in the premises, and in respect of all the matters set forth in said act, require that the said act of eighteen hundred and sixty-two be altered and amended as hereinafter enacted; and

Whereas, by reason of the premises also, as well as for other causes of public good and justice, the powers provided and reserved in said act of eighteen hundred and sixty-four for the amendment and alteration thereof ought also to be exercised as hereinafter enacted: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the

United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto.

SEC. 2. That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking-fund hereinafter provided, for the uses therein mentioned.

SEC. 3. That there shall be established in the Treasury of the United States a sinking fund, which shall be invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless, for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury, until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

SEC. 4. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Central Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eight-

een hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad-company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of eight hundred and fifty thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding.

SEC. 5. That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury, by either of said companies, that seventy-five per centum of its net earnings as hereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of such company, in respect of which obligations there may exist a lien paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is hereby authorized, and it is made his duty, to remit for such current year so much of the twenty-five per centum of net earnings required to be paid into the sinking fund, as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

SEC. 6. That no dividend shall be voted, made, or paid for or to any stockholder or stockholders in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums required as aforesaid to be paid into said sinking-fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon

any debt the lien of which, or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking-fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any such dividend, contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year.

SEC. 7. That the said sinking-fund so established and accumulated shall, at the maturity of said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof, according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon, and not reimbursed, subject to the provisions of the next section.

SEC. 8. That said sinking-fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking-fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having any claim upon said sinking-fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of discharging, out of other funds, its debts to any creditor except the United States.

SEC. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the Treasury, or into said sinking-fund under this act, or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted

or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper and lawful course of their current business, in good faith and for valuable consideration.

SEC. 10. That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceeding against the several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.

SEC. 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants, and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney-General to cause such forfeiture to be judicially enforced.

SEC. 12. That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal, as, in the opinion of Congress, justice or the public welfare may require. And nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in favor of the United States.

SEC. 13. That each and every of the provisions in this act contained shall severally and respectively be deemed, taken, and held as in alteration and amendment of said act of eighteen hundred and sixty-two and of said act of eighteen hundred and sixty-four respectively, and of both said acts.

Approved, May 7, 1878.

ACT OF JUNE 19, 1878.

20 Stat. 169. CHAP. 316.—An act to create an Auditor of Railroad Accounts and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes", approved July first, anno Domini eighteen hundred and sixty two, and the act entitled "An act relative to filing reports of railroad companies" approved June twenty-fifth, anno Domini eighteen hundred and sixty eight, be, and the same are hereby, repealed.

SEC 2. That the office of Auditor of Railroad Accounts is hereby established as a bureau of the Interior Department. The said Auditor shall be appointed by the President of the United States, by and with the advice and consent of the Senate. The annual salary of the said Auditor shall be, and is hereby, fixed at the sum of five thousand dollars. To assist the said Auditor to perform the duties of said office, the Secretary of the Interior shall appoint one bookkeeper at an annual salary of two thousand four hundred dollars, one assistant bookkeeper at an annual salary of two thousand dollars, one clerk at an annual salary of one thousand four hundred dollars, and one copyist at an annual salary of nine hundred dollars. Actual and necessary traveling and other expenses incurred in visiting the offices of the railroad companies hereinafter described, and for which vouchers shall be rendered, are hereby allowed, not to exceed the sum of two thousand dollars per annum; and it is hereby specially provided that each of said railroad companies shall furnish transportation over its own road, without expense to the United States, for the said Auditor or any person acting under his direction. Incidental expenses for books, stationery, and other material necessary for the use of said bureau are hereby allowed not

to exceed the sum of seven hundred dollars per annum. And the sum of twelve thousand dollars is hereby appropriated for the uses and purposes of this act for the fiscal year ending June thirtieth, anno Domini eighteen hundred and seventy-nine.

SEC. 3 That the duties of the said Auditor, under and subject to the direction of the Secretary of the Interior, shall be, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are in whole or in part west, north, or south of the Missouri River, and to which the United States have granted any loan of credit or subsidy in bonds or lands; to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any report received from them; to assist the government directors of any of said railroad companies in all matters which come under their cognizance whenever they may officially request such assistance; to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the government in regard to tariffs for freight and passengers and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the government; and to make an annual report to the Secretary of the Interior, on the first day of November, on the condition of each of said railroad companies, their road, accounts, and affairs, for the fiscal year ending June thirtieth immediately preceding.

SEC 4. That each and every railroad company aforesaid which has received from the United States any bonds of the said United States, issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States any lands granted to it for a similar purpose, shall make to the said Auditor any and all such reports as he may require from time to time and shall submit its books and records to the inspection of said Auditor or any person acting in his place and stead, at any time that the said Auditor may request, in the office where said books and records are usually kept; and the said Auditor, or his authorized representative, shall make such transcripts from the said books and records as he may desire.

SEC. 5 That if any railroad company aforesaid shall neglect or refuse to make such reports as may be called for, or refuse to submit its books and records to inspection, as provided in section four of this act, such neglect or refusal shall

operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand nor more than five thousand dollars, to be recovered by the Attorney-General of the United States in the name and for the use and benefit of the United States; and it shall be the duty of the Secretary of the Interior, in all such cases of neglect or refusal as aforesaid, to inform the Attorney-General of the facts, to the end that such forfeiture or forfeitures may be judicially enforced.

SEC. 6. This act shall apply to any and all persons or corporations into whose hands either of said railroads may lawfully come, as well as to the original companies.

SEC 7. This act shall take effect on and after the first day of July, anno Domini eighteen hundred and seventy-eight.

Approved, June 19, 1878.

No. 708

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,

Defendant in Error.

DEFENDANT'S POINTS.

S. W. SANDERSON,

For Defendant in Error.

NEW YORK:

Evening Post Steam Presses, 208 Broadway, cor. Fulton Street.

1878.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

Defendant's Points.

I.

So much of what purports to be the "Findings," as is contained in Subdivisions VI to XXII, both inclusive, must be disregarded.

First.—The matter referred to is a mere detail of the acts of the Government, through its officials, and the acts of the defendant, while respectively engaged in the performance of the contract. These acts, so far as detailed, constituted the *evidence* which was introduced at the trial. Considered as

The Pacific Railroad Acts of 1862-64 are not laws, at least so far as the Central Pacific Co. is concerned, but a mere contract of which this Court cannot take judicial notice. So of the orders of the President and the recommendations and orders of his Secretaries, and also the reports of Commissioners

facts they are merely *probative*, not *ultimate* or *issuable* facts. The latter only constitute the subject matter of a *special verdict* or *finding*. If *probative* facts are incorporated they do not thereby become matter of record. Probative facts can be brought here only by a bill of exceptions, or a statement, agreed to by counsel, or certified to be correct by the Judge, which is merely another form of a bill of exceptions. Until this has been done such facts rest in parol and cannot be brought here by a writ of error, which brings up the record only.

Suydam vs. *Williamson*, 20 *How.*, 427.
DeGroot vs. *United States*, 5 *Wall.*, 419.
McClory vs. *McClory*, 38 *Cal.*, 575.
Mathews vs. *Kinsell*, 41 *Cal.*, 512.
Pio Pico vs. *Cayas*, 47 *Cal.*, 174.

The complaint sets out the contract, in legal effect, in which, among other things, the defendant agreed to pay the plaintiff five per cent. of the net earnings of its road "after it was completed." It then alleges:

"That said railroad, mentioned in said Acts of Congress, and so undertaken to be built by said Central Pacific Railroad Company of California, and said Western Pacific Railroad Company, was fully completed on the 16th of July, 1869."

This allegation was denied by the defendant, and the issue thus made was the only issue about which there was any contention in the Court below.

The only response which the court was required to make to this issue was that the road was completed on the 16th of July, 1869, or on some other day. Hence, the fact and date of the completion of the road were the only ultimate issuable facts. All other facts connected with this question, are and were necessarily merely probative. Nowhere in the several parts of the findings, now under consideration, were these ultimate facts found. They contain nothing but a statement of the evidence in detail.

That these parts of the findings detail the evidence, merely from which, in part, the fact and date of completion were to be found, is further demonstrated by the findings themselves. At the commencement of the next subdivision (XXIII) we find this language :

"From satisfactory direct evidence *other* than the action of the Government and its officers, and *other* than the reports of said several commissions, the court finds the following additional facts : "

Here, by the judge himself, the matter in question is characterized as *evidence*. This language is followed by a finding of the fact and date of completion, which according to the statement of the judge himself, is deduced from the facts already stated, and other facts which follow, showing, conclusively, that in the mind of the judge, the facts previously and subsequently stated were mere probative facts from which he found the ultimate fact of completion.

Second.—If, as I have endeavored to show, the matter in question must be disregarded in the consideration of the case, but one result can follow—the judgment must be affirmed. In that event we have a record which shows that the road was not completed until Oct. 1, 1874. The finding to that effect cannot be impeached by anything now contained in the record. The only way by which it could have been impeached, as already suggested, was by a bill of exceptions containing all the evidence which was introduced upon that issue in the court below.

But conceding, for the sake of the argument, that the facts contained in the parts of the findings referred to are to be considered as ultimate facts, we say :

II.

That the conclusion of the court below that the road was not completed until Oct. 1, 1874, *is fully sustained by the findings.*

As to the Terms of the Contract.

The terms of the contract, so far as they are material to the present question, are as follows:

First.—What the Plaintiff Agreed to do.

1st. To grant a right of way for the road and its appurtenances (Sec. 2).

2d. To grant ten alternate sections of land, per mile, on each side of the road (Sec. 3).

3d. To give a certain number of bonds for each mile of road (Sec. 5).

4th. To deliver patents and bonds *pari passu* with the construction of twenty-mile sections of the road (Secs. 4 and 5).

Second.—What the Defendant Agreed to do.

1st. To construct a first class road in all respects (Sec. 4).

2d. To use only the best quality of American iron (Sec. 4).

3d. To adopt grades and curves not exceeding the maximum grades and curves of the Baltimore and Ohio Railroad (Sec. 12).

4th. To construct a track of uniform width (Sec. 12).

5th. To complete the entire road on or before July 1, 1876 (Sec. 17).

6th. To pay plaintiff, annually, five per cent. of the net earnings of the road from and after the date of its completion (Sec. 6).

Third.—MUTUAL AGREEMENTS.

1st. That the width of the track should be determined by the President of the United States (Sec. 12).

2d. That the location of junctions between connecting companies in case of dispute between such companies, should be determined by the President of the United States (Sec. 12).

3d. That the location of the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains should be fixed by the President of the United States (Sec. 11).

4th. That the eastern terminus of the road should be fixed by the President of the United States (Sec. 8).

5th. That the President of the United States should determine the places at which, and the terms upon which, other companies should have the right to connect with defendant's road (Sec. 15).

6th. That the quality of material and work should be determined by the President of the United States, that is to say, the President should prescribe *specifications* as to material and the mode and manner of construction, which should be a guide to the defendant in construction and to the President in determining the fact of completion (Sec. 4).

7th. That the fact and date of completion should be determined by the President of the United States (Sec. 4).

There can be no controversy as to the correctness of the foregoing synopsis of the contract, unless it be as to the last two subdivisions.

AS TO THE POWER OF THE PRESIDENT TO ANNEX SPECIFICATIONS TO THE CONTRACT.

The provisions of the contract, which deal with specifications and the power of the President in relation thereto, are as follows:

"SEC. 4. *And be it further enacted* that whenever said company shall have completed twenty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad—the rails and all the other iron used in the construction and equipment of said road to be of American manufacture, of the best quality—the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; *and if it shall appear to him* that twenty consecutive miles of said railroad and telegraph line have been completed and equipped *in all respects as required by this act* then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each twenty miles of said railroad and telegraph line are completed, upon certificates of said commissioners. Any vacancies occurring in said Board of Commissioners by death, resignation or otherwise shall be filled by the President of the United States; *provided, however,* that no such commissioners shall be appointed by the President of the United States unless there shall be *presented to him* a statement, verified on oath, by the President of said company that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin, and where the same end; which oath shall be taken before a judge of a court of record."

"SEC. 8. And be it further enacted that the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, *at a point to be fixed by the President of the United States after actual surveys;* * * *."

"SEC. 9. * * * The route in Kansas west of the meridian of Fort Riley to the aforesaid point on the one hundredth meridian of longitude *to be subject to the approval of the President of the United States, and to be determined by him on actual survey.*"

"SEC. 11. And be it further enacted that for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, *said points to be fixed by the President of the United States,* the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore, &c."

"SEC. 12. And be it further enacted that whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, *and in case of difference between them as to said location the President of the United States shall determine the said location;* * * * The track upon the entire line of railroad and branches shall be of uniform width, *to be determined by the President of the United States*, so that when completed cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore & Ohio Railroad; * * * *."*

"SEC. 14. And be it further enacted that the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the eastern boundary of the State of Iowa, *to be fixed by the President of the United States*, upon the most direct and practicable route, *to be subject to his approval*, so as to form a connection, &c. * * * And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City, upon the most direct and practicable route, to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, *said point of junction to be fixed by the President of the United States*, &c. * * * *."*

"SEC. 15. And be it further enacted that any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act at *such places*, and upon *such just* and *equitable terms as the President of the United States may prescribe*, * * * *."*

It is a universal custom to annex to contracts for the erection of buildings and the construction of public works what are called "specifications," which prescribe the quality of materials and work, and mode and manner of construction. In railroad contracts these specifications, among other things, designate the width of cuts and embankments, the quality, size and number per mile of ties, the kind of iron and the style and weight of rails, the maximum of grades and curves, how and with what materials, bridges, drains, culverts, &c., shall be constructed, and the kind and depth of ballasting, and the like. These

specifications are indispensable. Without them no contract is complete. Without them the one party has no guide in construction, and the other no standard by which to determine the question of performance or completion.

This contract, as written by Congress, contains these indispensable specifications to a limited extent only. The fourth and twelfth sections contain all that is said as to the quality of materials and work required. The kind and quality of iron is specified; uniformity in width of track is required, but the width is not specified, and the maximum of grades and curves is required to not exceed the maximum of grades and curves on the Baltimore and Ohio railroad. Here the specifications cease. As to all other matters and things which are usually and necessarily embraced in specifications, the contract merely provides that the road shall be "supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a *first-class* railroad." Nothing is said as to what materials shall be used in the construction of these drains, culverts, viaducts, bridges, &c. The sum of it all is, that none but American iron shall be used, the track shall be of uniform width, the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio railroad, and in all other respects the materials, work, equipments and appurtenances, shall be such as are used in the construction and operation of *first-class* railroads.

That this language leaves many questions open for the determination of some third party, is too obvious for argument. It certainly cannot be contended that either party to the contract was to decide these open questions, nor can it be supposed that Congress intended to leave their decision unprovided for. Nor has Congress done so. Congress intended that these questions should be submitted to and decided by the *President* of the United States, giving him the standard of a *first class*

railroad as his guide. That such is the case is necessarily implied from the following language of the fourth section:

"Whenever said company shall have completed twenty consecutive miles, * * * the President of the United States shall appoint three Commissioners to examine the same, and report to *him* in relation thereto; *and if it shall appear to him* that twenty consecutive miles * * * have been completed and equipped in all respects as required by this Act, he shall, &c.

That is to say, if it shall appear to him—*if he shall adjudge*—that the road has been completed and equipped in all respects as *first class* roads are completed and equipped, he shall, &c.

The performance of the duty thus cast upon him necessarily involves, first, the adoption of the *specifications* of a *first class* railroad; second, a comparison of the facts reported to him with such specifications, and, lastly, a decision or judgment that the construction reported corresponds with the construction required by such specifications. In no other way can the duty *expressly* conferred upon him be performed, and hence, as already suggested, the power to decide what constitutes a first class road is necessarily implied.

As to the Power of the President to Determine the Fact and Date of Completion.

This subject has been partially considered under the preceding head, but more may be said with profit.

The provisions of the contract, quoted above, show conclusively what position the President was intended to occupy. It was that of *arbiter* and *judge*. To him is referred for decision every question about which any controversy could arise between the United States and any one of the companies named in the Act, and also every question about which any controversy could arise between any two or more of said companies. The language throughout is explicit, and admits of no other

construction. Besides, the very nature of the case requires the presence of some third party, to decide all questions of difference. Such is the universal practice in all building contracts, and especially in such as provide for construction and payment *pari passu* as the work progresses

In contracts between private parties, the architect—in the case of a building—or the chief engineer—in the case of a railroad or canal, or other public work, is always selected to act as judge between the contracting parties in all controversies that may arise in the course of the performance of the contract. Where part performance by one party is conditioned upon prior part performance by the other party, there must of necessity be some one selected to determine when such prior performance has been completed. To this universal custom and universal necessity, this contract was made to conform.

The language of the fourth section of the contract leaves no room for doubt on this point. Whenever a section of the road is completed, in the opinion of the President of the Company, he is required to make and present to the *President* of the United States, a statement under oath to that effect. This being done, the duty is then cast upon the President of the United States to inquire, through commissioners to be appointed by him, into the facts, and when the facts have been reported *to him*, the further duty is cast upon him to decide whether the section in question has been completed according to the terms of the contract. "*If it appears to him*" that it has been so completed he so declares by approving the report of the commissioners and directing patents and bonds to be delivered. "*If it does not so appear to him*," he indorses his disapproval upon the report and thereby refuses to deliver patents and bonds. Thus a case is presented for his decision—he hears and weighs the evidence and then decides.

There can be no question but that in respect to the matters above referred to in sections 8, 9, 11, 12, 14 and 15, the duty of

the President was that of a judge. Upon what ground then can it be claimed that in relation to the matters referred to in the fourth section, his functions are not the same? If, as to the former, his relation was that of judge, by parity of reason and necessity, his relation as to the latter was also that of judge.

AS TO THE EFFECT OF THE PRESIDENT'S DECISIONS.

Such being his powers under the contract, the next question is as to the effect of his decisions while exercising them.

It is well settled that where, as here, the contract provides that certain matters or questions shall be determined by a certain person the decision of such person upon all such matters or questions, except in case of mistake or fraud, are binding and conclusive upon the parties.

Verdecker vs. *Vermont Cent. R. Co.* 27 Vt. 136.
Herrick vs. *Belknap's Estate*, 27 Vt. 679.
Monongahela Navigation Co. vs. *Fenlon*, 4 Watts & Serg. 205.
Faunce vs. *Burke*, 16 Penn. St. 469.
☞ *Mesener* vs. *Lancaster Co.*, 23 Penn. St. 291.

The case last cited is on all fours with the present case.

So the decision of any special officer or tribunal appointed by law to determine a particular fact is conclusive.

Burgess vs. *Gray*, 16 How. 64.
Johnson vs. *Towsley*, 13 Wall. 72.
☞ *Allen* vs. *Blunt*, 3 Story's C. C. R. 742.
Lewis vs. *Lewis*, 9 Mo. 183.

Town of Colonia vs Eaves 2

It is neither alleged, nor proved, nor found, t
the President in deciding any of the questio ...mitted to him by the contract, was founded upon mistake or tainted with fraud. We must therefore assume, for all the purposes of the

construction. Besides, the very nature of the case requires the presence of some third party, to decide all questions of difference. Such is the universal practice in all building contracts, and especially in such as provide for construction and payment *pari passu* as the work progresses

In contracts between private parties, the architect—in the case of a building—or the chief engineer—in the case of a railroad or canal, or other public work, is always selected to act as judge between the contracting parties in all controversies that may arise in the course of the performance of the contract. Where part performance by one party is conditioned upon prior part performance by the other party, there must of necessity be some one selected to determine when such prior performance has been completed. To this universal custom and universal necessity, this contract was made to conform.

The language of the fourth section of the contract leaves no room for doubt on this point. Whenever a section of the road is completed, in the opinion of the President of the Company, he is required to make and present to the *President* of the United States, a statement under oath to that effect. This being done, the duty is then cast upon the President of the United States to inquire, through commissioners to be appointed by him, into the facts, and when the facts have been reported *to him*, the further duty is cast upon him to decide whether the section in question has been completed according to the terms of the contract. "*If it appears to him*" that it has been so completed he so declares by approving the report of the commissioners and directing patents and bonds to be delivered. "*If it does not so appear to him*," he indorses his disapproval upon the report and thereby refuses to deliver patents and bonds. Thus a case is presented for his decision—he hears and weighs the evidence and then decides.

There can be no question but that in respect to the matters above referred to in sections 8, 9, 11, 12, 14 and 15, the duty of

the President was that of a judge. Upon what ground then can it be claimed that in relation to the matters referred to in the fourth section, his functions are not the same? If, as to the former, his relation was that of judge, by parity of reason and necessity, his relation as to the latter was also that of judge.

As to the Effect of the President's Decisions.

Such being his powers under the contract, the next question is as to the effect of his decisions while exercising them.

It is well settled that where, as here, the contract provides that certain matters or questions shall be determined by a certain person the decision of such person upon all such matters or questions, except in case of mistake or fraud, are binding and conclusive upon the parties.

Verderker vs. *Vermont Cent. R. Co.* 27 Vt. 136.
Herrick vs. *Belknap's Estate*, 27 Vt. 679.
Monongahela Navigation Co. vs. *Fenlon*, 4 Watts & Serg. 205.
Faunce vs. *Burke*, 16 Penn. St. 469.
☞ *Mesener* vs. *Lancaster Co.*, 23 Penn. St. 291.

The case last cited is on all fours with the present case.

So the decision of any special officer or tribunal appointed by law to determine a particular fact is conclusive.

Burgess vs. *Gray*, 16 How. 64.
Johnson vs. *Towsley*, 13 Wall. 72.
☞ *Allen* vs. *Blunt*, 3 Story's C. C. R. 742.
Lewis vs. *Lewis*, 9 Mo. 183.

Town of Colonia vs Eaves 2 Otto 484-490

It is neither alleged, nor proved, nor found, that the action of the President in deciding any of the questions submitted to him by the contract, was founded upon mistake or tainted with fraud. We must therefore assume, for all the purposes of the

present inquiry, that his decisions, in the premises, are conclusive and binding.

AS TO THE ACTION OF THE PRESIDENT, IN CONVENING A BOARD OF CIVIL ENGINEERS AND RAILROAD EXPERTS, TO ASSIST HIM IN ANNEXING "SPECIFICATIONS," AND THE EFFECT OF HIS ADOPTION OF THEIR REPORT UPON THE CONTRACT.

If, as I have attempted to show, it was the duty of the President to pass upon the quality of materials and the mode and manner of construction, his action in convening a Board of Civil Engineers and railroad experts, to consider and report a standard for the construction and acceptance of the road, as stated in the sixth finding, was not only justified by the terms of the contract, but a judicious and necessary act, in view of the situation in which he was placed. Not being a civil engineer nor a railroad expert, he was unavoidably driven to the necessity of calling to his assistance men whom education and calling had made competent judges. This was necessary, that he might be able to determine whether the defendant was building a *first-class* road. Without their assistance he could not have intelligently and faithfully performed his duty. *Qui facit per alium facit per se.* The deliberations and conclusions of the Board were his. By adopting their report he made the standard of construction and completion—therein recommended—his own, as much so as if, being competent, he had considered the subject and written the report himself.

This report, then, being the *act* of the *President*, in the exercise of the power and discretion conferred upon him by the contract, took the place of such "*specifications*" as the parties had omitted—became an indispensable part of the contract—*as much so as if it had been originally written in the body of the contract by Congress.*

Without it the defendant would have had no guide by which to construct the road, and the President no standard by which to determine the completion of the road. Without it the contract was imperfect and incomplete. With it the contract became perfect and complete in all its parts. *It is the contract thus perfected and completed, and not the contract in its previous incomplete state, with which we have to deal in this case.*

The contract thus completed and perfected, as stated in the Sixth Finding, contained, among other provisions, the following:

"Culverts and abutments for bridges and drains should be of stone, whenever a durable article can be obtained within reasonable distance—say, from five to eight miles—depending upon circumstances; provided that temporary trestles may be adopted upon assurances, to the satisfaction of the Commissioners, that stone abutments will be substituted immediately after the line shall be opened, so that stone can be transported thereon." * * *

"A railroad cannot be considered complete until it is well ballasted. If composed of gravel or broken stone, it should be from 12 to 24 inches thick, depending on the lower material. In view of the settling of new embankments, which require time and rains before ballasting can be properly placed, and also in view of the number of miles required by the law to be constructed, annually, *the perfect finish of the road-bed in this respect must be progressive and the work of time.* Yet it is the opinion of the Board that such work of perfecting the ballast must proceed *as usual* on first-class railroads; otherwise subsequent sections should not be accepted, because the whole work is not then being carried forward as a great Pacific railroad such as the law contemplates."

The meaning of this is, that a *first-class* railroad, two thousand miles in length, extending through a wilderness where for nine months of the year there is no rainfall to settle embankments, and where much of the way is sandy desert, upon which no material for ballast and no stone for culverts and abutments for bridges and drains can be found, cannot be constructed to a perfect finish or completion by sections of twenty miles. It being required that the road should be first-class, it must be constructed in the manner in which *first-class* roads are constructed, and their construction "*must be progressive, and the*

work of time." Time must be allowed for rain to fall and settle embankments before the work of ballasting is commenced. Time must be allowed for the extension of the road to points where material for ballast can be obtained, and in the meantime temporary trestles may be used, to be replaced, however, with permanent culverts and bridges, when material can be hauled, not in wagons, but over the road. In other words, the very idea of a *first-class* road negatives the possibility of complete construction by sections of twenty miles. Had such a course been pursued the road would still be in process of construction. Not more than twenty miles could have been constructed in each year. Over a hundred years would have been required to complete the road.

As to the President's Conditional Acceptances of Twenty-mile Sections.

This contract, as perfected and construed by the President, makes a distinction between a *provisional* and an *absolute* completion, and authorized the President to issue patents and bonds whenever a section of twenty miles had been provisionally completed, reserving the right, all the time, to withhold sufficient to secure an *absolute* completion. And such was the course, as the findings show, which the President pursued. Whenever the Commissioners reported that twenty miles had been constructed, so far as possible, after the manner in which long lines of first-class railroads are usually constructed, he *conditionally* accepted the road. He did not accept or adjudge the section to be complete. On the contrary he adjudged it to be incomplete; but in view of the fact that it was completed so far as it was practicable to complete it, observing the usual manner and mode of constructing *first-class* roads, he accepted upon the condition that within a reasonable time, acting according to the course usually observed in the construction of

first-class roads, it should be *absolutely* completed. An acceptance of such a character does not establish the fact of completion, but the reverse. *Such an acceptance can only take effect after the conditions imposed have been performed.*

This construction of the contract received the sanction of the highest law officer of the Government. The question was submitted by the President to the Attorney-General, who, among other things, said in reply:

"I am of the opinion that the true meaning of the fourth section of the Act of 1862 is *to submit to the final judgment of the President*, whether the work, in structure and equipment, is in due conformity with the requisitions of the Act, and that the service of commissioners to examine and report to him is but *an administrative aid* furnished to the President in the discharge of this executive duty. Nor have I any doubt that the course of the executive hitherto, whether under your own administration or that of President Lincoln, has been a just and judicious discharge of the discretionary responsibility thrown upon the executive by this provision of the Act. The usual steps of procedure for satisfying the executive that the Company is entitled to the Government subsidies from time to time, have all been kept within the administrative control of the executive. Thus the appointment of the commissioners requires the performance of their duty under instructions from the Secretary of the Interior. The advisory report of the 'Board' convened in February, 1866, *acquired the authority of a standard for the execution and acceptance of the work* in its successive sections, from its adoption by the Secretary of the Interior and its communication to the commissioners as their guide in the performance of their duties. In all this, the action of the Secretary of the Interior was the action of the executive under the authority of the President; such action of the Secretary being made the *law* of the *conduct* of the trust reposed in the commissioners by the express terms of their appointment by the President.

Nor do I entertain any doubt that this method of procedure was a competent and useful discharge of the executive duty in the premises. The whole policy of the legislation of Congress, as shown in the original and amendatory Acts, is most manifestly to give liberal and seasonable subsidies, which will, themselves, be available to the companies as means in the construction and equipment of the work in short and frequent stages of its progress, and the basis, in great part, of their credit in gaining from the community, in the shape of loans or stock subscriptions, the further means needed for the rapid and thorough completion of the whole line. The action of the advisory 'Board,' and its approval by the executive, in adopting a standard which recognized the *distinction* which the nature and

exigencies of the enterprise required to be drawn, in some particulars, between a *provisional* and an *absolute* completeness of the work in its successive stages, seem to me *entirely justified by the provisions of the Acts*. The main policy of the Acts was to *further and press on the work*, and their provisions exhibit a sensible deference to the practical conditions of its rapid and successful completion, not to be misunderstood.

But, upon the same reasons, and, indeed, in pursuance of the same method hitherto followed I am of opinion that it is entirely competent to the executive, through further instructions from the Department of the Interior to the commissioners and by means of *further inquiry and advice from competent engineers and experts*, in the construction and management of railroads, to provide for a *revision* of the work in the particulars in which a *provisional* completeness of successive sections was accepted, subject to an obligation on the part of the companies to make good, as far and as fast as might be, what needed subsequently to be supplied. And it will be competent to the executive to give substantial force to this right and duty thus far held in reserve by *refusing acceptance* to future sections which come up only to the standard of provisional and not absolute completeness, or by requiring the '*assurances*' of the companies or their *admitted obligations*, to make up the *temporary deficiencies* which have hitherto been relied on by the Government, to be strengthened by the *deposit* or *reservation* of a reasonable amount of securities to assure due performance of these obligations.

In what form and to what extent this authority of the executive, for which I thus find a legal warrant, should be interposed, is a question of practical administrative discretion. It is, however, proper that I should add that the main policy of the legislation of Congress, in securing a rapid as well as thorough execution of the great work of a through railroad line to the Pacific, which has thus far been fully maintained in the action of the executive, *does not need to be and should not be departed from*.

It cannot, as yet, be assumed that the work, in its past sections, has not been brought up as far and as fast as a just and fair expectation of the Government should require, in the particulars in which the 'standard' hitherto insisted upon by the executive has admitted a temporary incompleteness. Or if the representations made to the Government seem to render this probable, still the extent of such blamable deficiency does not, as yet, appear by any responsible survey, or by the concurrent assent of the company or companies. On the other hand, it is, I conceive, indisputable, that the long reach of the road and the length of time in which future sections of the road are to be presented for acceptance and for the advance of the subsidies, will furnish adequate opportunities for the due protection of the executive duties in the premises.

The result of my consideration of the subject, therefore, is that it is competent for the executive to apply to the present situation of the whole work the standard of com-

pletion, both of structure and equipment, which has been deliberately and wisely, as I think, adopted, and to ascertain in what condition the work stands in those particulars to which attention has been called; and in doing this, it will be competent for the executive to maintain the general principle of advances upon the sections from time to time proposed for acceptance as only provisionally complete, and yet upon evidence that the supplemental work on past sections is not being adequately brought up, to enforce upon the companies due attention to their obligations in this behalf."

The proposition on the part of the plaintiff that these conditional acceptances were judgments which established the completion of the road cannot be sustained. Nor does the fact that patents and bonds were issued upon these conditional acceptances establish the fact of completion. It was not the issuing of patents or bonds, but the *declaration* of the President that established that fact. The President may have issued patents and bonds in advance of the time at which the defendant became entitled to them, but this fact, if true, could not affect the question of completion or its formal decision by the President. Suppose the President had issued all the bonds when the road was only half completed, but, when doing so, had protested that the road was not complete, would the road have been then completed, and would the plaintiff's right to five per cent. of the net earnings have then accrued? The idea is absurd; and its absurdity exhibits the fallacy of the plaintiff's reasoning.

The appointment by the President of a commission of revision composed of civil engineers to examine the road so accepted, as stated in the eighth finding, negatives the idea that such acceptances operated as a judgment establishing completion.

The order of the Secretary of the Interior made pending the examination of these commissioners, as stated in the thirteenth finding, directing patents and bonds to be withheld, until further orders, negatives the idea that these conditional acceptances were decisions by the President that the road was so far completed.

The order of the Secretary of the Interior exacting the deposit by the defendant of $4,000,000 of its first mortgage bonds and the execution of an agreement that they should remain as security for the completion of the road, as stated in the thirteenth finding, negatives the idea that the road, so far as then constructed, had been accepted by the President as completed according to contract.

The passage by Congress of the joint resolution of the 10th of April, 1869, authorizing the President to appoint a Commission of Eminent Citizens, as stated in the tenth finding, to examine the road and report its condition, and what sum or sums would be required to complete it as a *first-class* road, and directing him to withhold sufficient subsidy bonds, or make requisition upon the defendant for sufficient of its first mortgage bonds to secure its completion, negatives the idea that the road or any part thereof, in the judgment of any department of the Government, had been accepted as complete.

That the claim of the plaintiff that the road was accepted as complete on the 16th of July, 1869, is without the slightest foundation, is further illustrated by reference to the terms in which it was made, as stated in the fourteenth finding. In transmitting the report of the commissioners to the President the Secretary of the Interior said:

"I respectfully recommend the acceptance of the same, and that bonds be issued to the company thereon in accordance with the agreement made with the company, which is to the effect that they deposit their first mortgage bonds with the Secretary of the Treasury, to such an amount as may be deemed necessary to secure the *ultimate* completion of the road agreeably to the provisions of the Act approved July 1, 1862."

The President upon this report and letter made the following endorsement:

"The recommendations of the Secretary of the Interior are approved and the Secretary of the Treasury and himself are hereby directed to carry the same into effect."

This action was the reverse of an acceptance of the road as complete.

The utter groundlessness of this claim of the plaimtiff becomes further apparent when it is remembered that only two months prior to this supposed acceptance of the road the Commission of Revision had reported, as stated in the ninth finding, that it would require an expenditure of not less than $4,493,380 to bring 551 miles of the road (about two-thirds of the road) up to the standard of completion required by the contract.

With this report before him it is not reasonable to suppose that the President only two months after the report was made, would or did declare the road completed.

The utter groundlessness of this claim becomes further apparent, when it is remembered that but a little more than two months before this supposed acceptance, Congress had intervened, as stated in the tenth finding, and to a certain extent taken the question into its own hands, and that by direction of Congress the President had appointed a Commission of Eminent Citizens to examine the *entire* road and report what sum or sums would be required to complete it as a *first-class* road, and that, *at the time of said supposed acceptance, said commission had not even commenced the labor assigned them* (*Finding, XII*).

In view of such conditions it is not reasonable to suppose that the President would or did, at the date in question, accept the road as completed according to contract.

Thus it appears, that until the commencement of this action, every Department of the Government, which has had any connection with the performance of this contract, has persistently insisted that the road was not completed until the first of October, 1874, and at first, patents and bonds, and, afterwards, patents only were withheld, against the repeated demands of the defendant, for that reason. The Government has blown hot and cold. Whenever called upon by the defendant for

patents and bonds it has insisted that the road was not completed until the first of October, 1874, and until after that date refused all demands therefor. As late as June, 1871, we have the objection of the Secretary of the Interior to any legislation by Congress affecting the lands, because they were held as security for the completion of the roads, until the "Executive" should be "satisfied that all the deficiences reported by the said 'eminent citizens' have been supplied and that the roads are completed as required by law." And now, for the first time, and when claiming its supposed share of the net earnings, it insists that the road was completed years before, on the 16th of July, 1869.

As to the effect of the deposit of $4,000,000 *first mortgage bonds and the agreement in relation thereto, and the joint resolution by Congress of the* 10*th of April*, 1869.

It has been said by the Court of Claims that the deposit and agreement made by the defendant in compliance with the demand of the Secretary of the Interior is a false quantity in the solution of this question. The reason assigned is that the act was *ultra vires* the contract and therefore "*purely voluntary.*" With due deference I am compelled to dissent from this conclusion.

First.—If the construction given to the contract by the President and the Attorney-General, and which I have labored to show is the true construction, be correct, the requisition of the Secretary of the Interior, and the compliance therewith by the defendant, find full warrant *inside* the contract, even if we exclude from the contract the joint resolution of the 10th of April, 1869.

Second.—These acts find full warrant in the joint resolution of the 10th of April, 1869. That resolution was passed *prior* to the making of the deposit and agreement in question. The title of the resolution is:

"Joint resolution for the Protection of the Interests of the United States, in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes."

The second and third sections are as follows:

"SEC. 2. *And be it further resolved*, That, to ascertain the condition of the Union Pacific Railroad and the Central Pacific Railroad, the President of the United States is authorized to appoint a Board of Eminent Citizens, not exceeding five in number, and who shall not be interested in either road, to examine and report upon the condition of, and what sum or sums, if any, will be required to complete each of said roads, for the *entire length thereof*, to the said terminus, as a *first-class railroad* in *compliance* with the several acts relating to said roads * * * *."

"SEC 3. *And be it further resolved*, That the President is hereby authorized and required *to withhold from each of said companies an amount of subsidy bonds* authorized to be issued by the United States under said acts, sufficient to secure the full completion, *as a first-class road*, of all *sections* of such road upon which *bonds* have already been issued *or in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company*; and if it shall appear to the President that the amount of subsidy bonds yet to be issued to either of said companies is insufficient to secure the completion of such road, *he may make requisition upon such company for a sufficient amount of bonds already issued to said company*, or, *in his discretion, of their first mortgage bonds*, to secure the full completion of the same. And in default of obtaining such security as is in this section provided, the President may authorize and direct the Attorney-General to institute such suits and proceedings on behalf and in the name of the United States * * * as shall be necessary to compel the giving of such security, and thereby, *or in any manner, otherwise*, to protect the interests of the United States in said road, *and to insure the full completion thereof as a first-class road*, as required by law and the statutes in that case made."

That this language authorizes and requires the acts in question is too plain for argument. The only question that can be made, in this connection, is whether the resolution itself was within the power of Congress—had Congress the power to intervene and provide for the determination of the question of completion after having agreed that that question should be decided by the President? This question, upon examination, is also free from doubt.

The exercise of this power by Congress was provided for in the contract. The last clause of the 18th section of the Act of 1862 provides:

"And the better to accomplish the object of this Act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes,—*Congress may*, at any time—having due regard for the rights of said companies named herein—*add to*, alter, amend, or repeal this Act."

Also the 22d section of the Act of 1864 provides:

"*And be it further enacted*, That Congress may at any time alter, amend or repeal this Act."

Whatever limitations there may be upon the exercise of this *reserved power*—and there are many—this joint resolution is not in conflict with them. It in no respect impairs the contract or the rights of the defendant under it. On the contrary it looks solely to a completion of the road *according* to the contract, and in no material respect changes its terms. It is, therefore, submitted, notwithstanding the opinion of the Court of Claims, that this deposit, agreement and joint resolution constitute material factors in the solution of the question before the Court.

As to the construction of the contract, if the report of the Advisory Board, the deposit, the agreement, and joint resolution be eliminated.

Thus far I have attempted to show that the specifications of a *first-class* railroad reported to the President by the Advisory Board of Engineers and Railroad Experts and adopted by him, the joint resolution, by Congress, of the 10th of April, 1869, and the acts of the Secretary of the Interior, under it, in requiring the deposit and agreement above referred to, constitute parts of the contract in question and factors in the solu-

tion of the question of completion. I now propose to disregard them and discuss the question upon the theory that the Acts of 1862 and 1864 contain the entire contract, claiming that the course of the President in accepting *provisional* construction in respect to twenty-mile sections, and deferring his decision of the question of completion until after the laying of the last rail, finds warrant in the contract thus emasculated.

The 17th section of the Act of 1862 contains the following proviso:

"* * * * *provided*, that of the bonds of the United States in this Act, provided to be delivered for any and all parts of the road to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada Mountains, *there shall be reserved* of each part and instalment twenty-five per centum, to be and remain in the United States Treasury, undelivered, until said road and all parts thereof provided for in this Act are *entirely* completed, and of all the bonds provided to be delivered for the said road, between the two points aforesaid, *there shall be reserved* out of each instalment fifteen per centum, to be and remain in the Treasury until the *whole* of the road provided for in this Act is *fully* completed; and if the said road, or any part thereof, shall fail of completion at the time limited therefor in this Act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States."

It is true that the foregoing provision was repealed by the 7th section of the Act of 1864, but this circumstance does not destroy its value as a factor in the construction of section four of the Act of 1862. At the time the fourth section was written, this provision was a part of the Act, and the meaning of the fourth section, so far as affected by this provision, has not been changed by its repeal. For the purpose, then, of construing other contemporaneous parts of the contract, it must be regarded as being still a part of the contract.

This provision clearly shows that Congress foresaw and provided for what the Advisory Board declared and experience has demonstrated, that a first-class railroad two thousand miles long, in an arid climate, scaling mountains, or diving through their bowels and extending over deserts destitute of many in-

dispensable materials, for its construction, could not be completely finished and equipped by sections of twenty miles each, and hence that a literal compliance with the provisions of the fourth section, so far as they relate to performance by the defendant, could not be rationally demanded, and that a literal compliance with those relating to performance by the plaintiff for obvious reasons, ought not in that case to be observed. The greatest speed in construction was desired, and it was foreseen that success in that respect could only be attained by allowing and accepting a *provisional* completion as to twenty mile sections and reserving sufficient sums to ensure *absolute* completion by defendant, or, in case of default on its part, by other hands. Thus it seems clear that the contract, in its original form, authorized the course which the President adoptod.

As to the Spirit of the Contract.

Not the words merely, but the object, purpose and spirit of the contract must be consulted in its construction.

The opinion of this Court in the case of the *United States* vs. *Union Pacific Railroad Company* (91 United States' Reports, 78), presents a very full and clear view of the spirit, object and intent of this contract, and the times and circumstances under which it was made. The question there was as to the obligation of the Company, to pay to the United States, interest on the subsidy bonds semi-annually as it falls due. The reasoning of this Court, in that case, to show that Congress never intended to require the payment of interest until the principal should become due, applies with equal force to the present question. This Court said at page 88:

"The Act, as has been stated, was passed in the midst of war, when the means for national defense were deemed inadequate, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific and Atlantic States. Confessedly the undertaking was beyond the ability of unaided private capital,

Only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. *Local business, as a source of profit, could not be expected while the road was in course of construction*, on account of the character of the country it traversed; and whether, when completed, it would prove valuable as an investment, was a question for time to determine. But, vast as was the work, limited as were the private resources to build it, the growing wants as well as the existing and future military necessities of the country, demanded that it be completed. Under the stimulus of these considerations Congress acted, not for the benefit of private persons, nor in their interest, but for an object deemed essential to the security as well as to the prosperity of the nation.

"Compelled as it was to incorporate a private company to accomplish its object, it proffered the terms on which it would lend its aid. If deemed too liberal now, they were then considered, with the light before it, not more than sufficient to engage the attention of enterprising men, who, if not themselves possessing capital, were in a position to command the use of it. These terms looked to ultimate security, rather than immediate reimbursement, *inasmuch as the corporation would require all its available means in construction*; and to require it, while the work was in progress, to keep down the interest on the bonds of the United States, might seriously cripple the enterprise at a time when the primary object of Congress was to advance it. There could, however, be no reasonable objection to the application 'of all compensation for services rendered for the Government' from the outset, and of 'five per cent. of the net earnings after the completion of the road' to the payment of the bonds and interest. These exactions were accordingly made.

"Of necessity there were risks to be taken in aiding with money or bonds an enterprise unparalleled in the history of any free people, the completion of which, if practicable at all, would require, as was supposed, twelve years. But these risks were common to both parties. Congress was obliged to assume its share, and advance the bonds, or abandon the enterprise; for clearly the grant of lands, however valuable after the road was finished, could not be available as a resource for building it.

"If the road were a success, in addition to the benefits it would confer on the United States, the corporation would be in a situation to repay the advances for interest and the principal when due. If, on the contrary, it proved a failure, subjecting the private persons who invested their capital in it to a total loss, there would be left the entire property of the corporation, of which immediate possession could be taken by the Government on a declaration of forfeiture.

"The circumstances under which the Act of 1862 was passed, the purpose to be accomplished by it, and its scope and effect, are inconsistent with the position assumed by the appellant."

For the reasons here so clearly stated it is evident that Congress did not intend to exact five per cent. of the net earnings of the road until after the road should be *entirely* completed. Until after the Construction Account had been closed and the balance struck, it was rightly supposed that the defendant would be in need of all its available resources for the purposes of construction, and, as in the case of the interest on the subsidy bonds, to require payment of five per cent. of net earnings while such necessity continued, would, in the language of this Court, seriously cripple the enterprise at a time when the primary object of Congress was to advance it.

The case shows that at the time of the alleged completion the expenditure of nearly five millions of dollars was required to complete the road, and that between that time and the 1st of October, 1874, more than that sum was actually expended in bringing the road up to the standard required by Congress. The Construction Account was not closed until that date, and all the available resources of the Company up to that date were needed and used by the defendant for the purposes of construction.

AS TO APPELLANT'S POINTS.

Thus far I have confined myself to a brief presentation of the defendant's theory. In doing so I have incidentally touched upon the opposing theory of the plaintiff, but have attempted no direct answer to points which were made, on behalf of the plaintiff, in the court below, and in the Court of Claims in the case against the Union Pacific. Assuming that the same points will be made here, I now proceed to notice them :

First.

It was claimed in the Union Pacific case, in the Court of Claims, "that these agreements for the deposit of First Mortgage bonds, and the withholding of patents for lands, were voluntary on the part of the company, and were made without any express authority of law." This view was sustained by that court.

Conceding, for the sake of the argument, that this point was well taken in that case, it cannot be well taken in this case, for the reason that the facts in the two cases are not the same. Care must be taken not to confound the facts of the two cases.

The agreement, in the Union Pacific case, was made on the 12th of February, 1869, *at the instance of the Attorney-General*, and the deposit of bonds, therein provided for, was made on the fourth day thereafter.

So far as I am advised, there was no order by the President, or either of his Secretaries, requiring this agreement and deposit to be made. For validity, therefore, they depend entirely upon the action of the Attorney-General. And especially should it be borne in mind that at the date of this agreement and deposit the joint resolution of Congress requiring the President to obtain security for the completion of the road had not been passed.

In the case of this defendant, however, an *order was made* on the 22d of March, 1869 (more than a month after the agreement and deposit of the Union Pacific was made), by the Secretary of the Interior, acting under authority from the President, requiring the defendant to make a similar agreement and deposit. This order the defendant did not comply with until *after* the passage of the *joint resolution* requiring the President in effect to take such agreement and deposit. (See XIII Finding.)

Thus it appears that the facts of the two cases differ widely. While it may be questioned whether the joint resolution of the

10th of April, 1869, ratified and confirmed the agreement and deposit of the Union Pacific, so as to take it out of the category of voluntary acts, there can be no doubt but that it ratified and confirmed the act of the President, through the Secretary of the Interior, requiring the defendant to make its agreement and deposit. The joint resolution simply required the President to do what his Secretary had already done. It would have been an idle ceremony to repeat the order, and a compliance therewith, by the defendant, became clothed with the same legal effect as if the order had been made after the passage of the joint resolution instead of before. Why the order was made before the passage of the resolution which authorized it, is obvious. The order was not made until after the 22d of March, and the resolution was passed on the 10th of April.

From our knowledge of the course of legislation it thus appears that the resolution had been introduced *before*, and was on its way through Congress *at the time the* order was made. The Secretary of the Interior, believing that the resolution would pass, and therefore, if necessary, give validity to his order, for sufficient reasons, doubtless, apparent to him, took time by the forelock, so that the benefits expected to result from the resolution might not be lost or jeopardized by delay.

Thus it seems that the agreement and deposit, made by the defendant, was not a *voluntary* act, but an act required by Congress while in the exercise of power reserved to it by the contract, as already shown. And such being the case the act becomes a most important factor, as will appear more fully hereafter in the solution of the question in hand.

Second.

It has also been claimed on the part of the plaintiff that the last commission (the commission of 1874, which reported that

the road was completed on the first of October, 1874,) was an illegal body; that is to say, a body not authorized by the contract, and that, therefore, their action and its approval by the President, was entirely ineffectual for any purpose.

If, as I claim, and have attempted to show, the President was chosen to determine, as between the parties, the fact and date of completion, he had a right to appoint as many commissioners as he saw proper for the purpose of reporting facts which he could not otherwise obtain, and without which he would have been unable to exercise his judgment in the premises, and he had this right by virtue of the original contract, and no further legislation was needed to enable him to appoint the commission in question.

But there is still another answer to this point.

If the original contract did not vest him with this power, the joint resolution of the 10th of April, supplemented by the agreement made by the defendant in pursuance of that resolution, did.

By that resolution the President was required to take all such steps as might be necessary to secure the completion of the road and was authorized "to direct the Attorney-General to institute such suits and proceedings on behalf and in the name of the United States * * * * as shall be necessary to compel the giving such security, and thereby, *or in any manner otherwise*, to protect the interests of the United States in said road, and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made."

Here was complete authority to make the agreement which was made with the defendant. If the end proposed could be secured by an amicable agreement, it was better to secure it in that way than by a resort to the courts. This course was the "*or in any manner otherwise*" provided for in the resolution.

The discretion of the President, acting by the Attorney-General, was unlimited. He could make any contract which,

in his judgment, would protect the interests of the United States. A contract that bonds should be deposited, and patents withheld until a commission appointed by him should declare the road completed, was clearly within the powers conferred and the duties enjoined upon him. Accordingly a contract of that kind was made with the defendant. Among other things it was agreed that "the four millions of dollars of First Mortgage bonds of said company (defendant), which it has this day deposited with the Government, * * * are and may, and shall be, held by the Government as security for the completion of the structure and equipment of the road of said company, according to the provisions of the statute * * * until the President of the United States, *on a* proper *examination* of the *actual completed* road and equipments, *shall be satisfied* that the same are so completed as a first-class railroad according to law, * * * and it is further agreed that the lands granted as a portion of the subsidy of said company, for which patents have not been issued, shall also be held in like manner by the Government of the United States as security for the completion and equipment of said railroad." (See XIII Finding.)

This contract provides for a *re-examination* of the "actual *completed road*," and if, as I have shown above, it was within the power of the President or Attorney-General to make it (acting under the joint resolution), then the appointment of the commission of 1874 was not only not *ultra vires*, but was the performance of a duty cast upon the President by the joint resolution and the agreement with the defendant made in pursuance thereof.

In answer to this point, I desire to add that this joint resolution, and the agreement made in pursuance thereof, constitute a new departure in the history of this case, and that it is not necessary to go behind them in the determination of the question before the court; for if there be any doubt as to the power of the President to decide the question of completion, under the terms of the original contract, or under the Act of

1862, no such doubt can exist as to such power under this joint resolution and agreement. Under the resolution it was his duty to see that the road was completed as a first-class road. In other words, the duty was cast upon him to determine the character of the road and the fact and date of its completion. The plaintiff made it his duty and the defendant agreed that he might perform that duty. He performed the duty, thus cast upon him by the agreement of the parties, and finally adjudged that the road was completed as a first-class road on the first day of October, 1874, and his judgment, as has been shown at another place in this brief, is binding and conclusive upon both parties.

In conclusion, upon this point, I desire to again call the attention of the court to the fact that the commission, appointed by the President under this joint resolution, reported, on the 3d of November, 1869, that it would require an expenditure of not less than $576,650 to complete the road according to the contract (see Finding XVI). In view of this report, it became necessary for the President to appoint at least another commission to ascertain whether these deficiencies had been supplied. In no other way could he have carried out the purpose of the joint resolution, which, in effect, required him to resort to any and all measures which might be necessary to secure the completion of the road as a first class road. His power, then, under this resolution, was not necessarily exhausted by the mere appointment of the commission of eminent citizens, as claimed by the other side; on the contrary, his power was adequate to the appointment of as many commissions as the exigencies of the case might require. So it seems clear, that even if the defendant had not agreed to the appointment of the commission of 1874, the President would have had ample power, under the joint resolution alone, to make the appointment.

Third.

It has been also said: "That the order of March 22, 1869, withholding all patents as security for the completion of the road, and the order of November 3d, 1869, modifying it so as to direct the withholding of patents for one-half of the lands, as such security, were beyond the power of the Secretary of the Interior to issue, so all subsequent action respecting the withholding of land patents, as far as it was attempted to effect the question of the completion of the road, was *illegal* and *void*."

My last answer is also an answer to this point. The order was made pursuant to the defendant's agreement made on the 28th of June, 1869, which agreement, as shown above, was authorized by the joint resolution, particularly that clause of it which is in these words, "*or in any manner otherwise*." The resolution directs that bonds be taken as security, or that the interests of the United States be protected, and the construction of the road secured "*in any manner* otherwise." To agree that the patents should be withheld was "a manner otherwise."

Fourth.

It was also claimed in the court below that the defendant was estopped to deny that the road was completed on the 16th of July, 1869, by reason of the sworn statement of its President, and its receipt of the subsidy bonds on the several sections of the road as they were provisionally completed.

An estoppel merely shuts out the truth. It is of the essence of an estoppel that it be mutual, for unless it binds both parties it binds neither. Now, the Government, in giving its bonds, expressly *denied* the fact of completion and reserved the question for future examination and decision.

The alleged estoppel is an estoppel *in pais*: "The doctrine of an estoppel *in pais* proceeds wholly on the theory that the party to the estoppel has, by his declarations or conduct, misled another to his prejudice, so that it would be a fraud upon him to allow the true state of facts to be proved."

(Martin *vs.* Zillerback, 34 Cal., 314, 315, and cases there cited.)

Had the President in passing upon the question of completion, acted upon the faith of the sworn statements of the President of the defendant, this alleged estoppel might have had some ground to rest upon. But such was not the fact.

These statements were required and were made merely for the purpose of putting the President in motion. On the faith of these statements he merely appointed commissioners. When he came to pass upon the question of completion he looked solely to the report of the commissioners, and if he was misled, it was not by any act or declaration of the defendant. The report of the commissioners was not the act of defendant, but the act of a body over which the defendant had no control.

But as a matter of fact the President was never misled or deceived by anybody. He knew the sections reported on were reported as not complete and he therefore accepted them conditionally.

Fifth.

It has also been claimed that it was not within the power of the President to determine the fact and date of completion. In the Court of Claims, counsel, in support of this point, said: "Certain requirements being observed the road became completed by *operation* of *law* and not by the action or want of it by the executive."

I have already discussed the power of the President, in this respect, and again refer to it merely to say, that if the above remarks of counsel be true, it is more than probable that this is the first railroad that was ever "completed by operation of law."

Sixth.

Much has also been said as to the meaning of the words "complete," "completion" and "completed," and an effort has been made to show, that as used in this contract they mean something less than the lexicons declare. As long as anything remains to be done to it, a thing cannot be complete. Such is the ordinary meaning, and there is nothing in this contract to show that it has been here used in a different sense.

Conclusion.

Having said all I desire to say in reply to supposed points on the other side, I conclude by saying that there can be only two ways by which the fact and date of the completion of the Central Pacific road can be determined.

One being by the judgment of the President, and the other by the judgment of the courts. I have endeavored to show that the former is the true mode, but should the other be held to be the true mode, then the plaintiff has no case whatever. Testimony of experts was received upon the question of completion and *upon that testimony* the court has found that the

road was completed on the first of October, 1874—nearly two years in advance of the time fixed in the contract—and was not completed before that time. Upon either theory I respectfully submit that the judgment ought to be affirmed.

S. W. SANDERSON,
For Defendant.